

(25,414)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 584.

THE PENNSYLVANIA FIRE INSURANCE COMPANY OF
PHILADELPHIA, PLAINTIFF IN ERROR,

vs.

THE GOLD ISSUE MINING AND MILLING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 UNITED STATES OF AMERICA,
 State of Missouri, ss:

THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
Plaintiff in Error,

THE GOLD ISSUE MINING AND MILLING COMPANY, Defendant in
Error.

To the Clerk of the Supreme Court of the State of Missouri:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the Supreme Court of the United States under the writ of error allowed and issued from said court and include in said transcript the following pleadings, proceedings and papers on file to wit:

1. The certified copy of the judgment of the Circuit Court of Audrain County, Missouri, together with the order of said Court allowing an appeal, filed in the case of The Gold Issue Mining and Milling Company, Respondent, v. The Pennsylvania Fire Insurance Company of Philadelphia, Appellant in the Supreme Court of Missouri, also the date of filing of said certified copy of said judgment and order allowing appeal and the record entry of the filing of the same in the Office of the Clerk of the Supreme Court of Missouri.

2. All of the abstract of the record filed by the appellant in case No. 17298 in the Supreme Court of The State of Missouri, entitled, The Gold Issue Mining and Milling Company, Respondent, versus The Pennsylvania Fire Insurance Company of Philadelphia, Appellant.

3. The following decisions and opinions of the courts of the State of Colorado, shown by said abstract of the record to have been admitted in evidence in the trial of said cause and found in said abstract of record, as follows:

2 Ohio Colorado Mining and Milling Company v. Elder, reported in the 99th Pacific Reporter, pages 42 to 44; admitted in evidence, abstract of record, page 222.

Rollins v. Fearnley, reported in the 101st Pacific Reporter, pages 345 to 348, admitted in evidence, abstract of record, page 224.

International Trust Company v. A. Leschen & Sons Rope Co., reported in the 92nd Pacific Reporter, pages 727 to 731; admitted in evidence, abstract of record, page 224.

Miller v. Williams, reported in the 59th Pacific Reporter, pages 740 to 743; admitted in evidence, abstract of record, page 225.

Farmer and Merchants Insurance Company v. Nixon, reported in the 30th Pacific Reporter, pages 42 to 43; admitted in evidence, abstract of record, page 225.

The German American Insurance Company v. Hyman; German Alliance Insurance Company v. Same, reported in the 94th Pacific

Reporter, pages 27 to 35; admitted in evidence, abstract of record, page 226.

Strauss v. The Phenix Insurance Company, reported in the 48th Pacific Reporter, pages 822 to 825; admitted in evidence, abstract of record, page 227.

Helvetia Swiss Fire Insurance Company v. Edward P. Allis & Company, reported in the 53rd Pacific Reporter, pages 242 to 247; admitted in evidence, abstract of record, page 227.

Hartford Fire Insurance Company v. Smith et al., reported in the 3 Colorado Supreme Court Report, pages 422 to 428; admitted in evidence, abstract of record, page 234.

Witch v. The Equitable Fire and Marine Insurance Company, reported in the 2nd Colorado Appeal Reports, page 488 to 492; admitted in evidence, abstract of record, page 234.

Jones v. Aspen Hardware Company, reported in 21st Colorado Report, page 263 et sequitur, and in 40th Pacific Reporter, page 457 et sequitur; admitted in evidence, abstract of record, page 241.

Western Electrical Company v. Pickett et al., reported in the 118th Pacific Reporter, page 988 et sequitur; admitted in evidence, abstract of record, page 242.

Iron Silver Company v. Cowie, reported in the 31st Colorado Report, pages 450 et Sequitur, and in the 72nd Pacific Reporter, pages 1067 et sequitur; admitted in evidence, abstract of record, page 243.

3 The Colorado Iron Works v. Sierra Grande Min. Co., reported in the 15th Colorado Report, pages 499 et sequitur, and in the 25th Pacific Reporter, pages 325 to 329; admitted in evidence, abstract of record, page 244.

4. The record entries showing; (a) the submission of case No. 17298, The Gold Issue Mining and Milling Company, Respondent v. The Pennsylvania Fire Insurance Company of Philadelphia In Division No. One of the Supreme Court of Missouri; (b) the order of Division No. One transferring said cause to the Court in Banc; (c) the order showing the submission of said cause to the Court in Banc; (d) the judgment and decision of said court in Banc; (e) all opinions of the court and judges of the court filed in said cause; (f) the order showing the filing of motion for rehearing by Appellant and date thereof; (g) said motion for rehearing; (h) the order overruling said motion for rehearing.

5. The writ of error heretofore issued in this cause.

6. The assignment of errors and prayer for reversal heretofore filed by plaintiff in error.

7. The citation to defendant in error with return and acknowledgment of service upon defendant in error.

8. The certificate of lodgment showing lodging of copy of writ of error for defendant in error and supersedeas bond with the Clerk of the Supreme Court of Missouri.

9. The petition for allowance of a writ of error in this cause presented to the Honorable Archelaeus M. Woodson, Chief Justice of the Supreme Court of Missouri, on April 27th, 1916.

10. The order signed by the Honorable Archelaeus M. Woodson.

Chief Justice of the Supreme Court allowing the writ of error in this cause on April 27th, 1916.

11. The record of the Supreme Court of Missouri showing; the presentation on April 27th, 1916, to the Honorable Archelaus M. Woodson, Chief Justice of the Supreme Court of Missouri, of the petition of plaintiff in error for the allowance of a writ of error in this cause, of the assignment of errors and prayer for reversal, of a supersedeas bond in the amount of \$10,000.00 and for a citation to defendant in error; the signing of the order allowing and the allowance — said writ of error, the signing and issuance of the citation to defendant in error, and the approval of said bond, by the aforesaid the Honorable Archelaus M. Woodson; and the filing, of said assignment of errors and prayer for reversal, of said supersedeas bond, of said order allowing said writ of error, of the writ of error issued in said cause with a copy thereof for defendant in error, and of the filing of the citation to the defendant in error with acknowledgment of due service thereon.

4 12. The supersedeas bond filed in this cause.

13. The stipulation filed by the parties in case No. 17298 The Gold Issue Mining and Milling Company, Respondent v. The Pennsylvania Fire Insurance Company Appellant in the Missouri Supreme Court omitting the printing of all decisions of the courts of Colorado introduced in evidence in the trial of said cause; the order filing said stipulation, and the order of the Supreme Court that said decisions be omitted from the abstract of record in said cause and be considered as part of the record.

Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States.

FRED HERRINGTON,
LEWIS AND GRANT,
DAVID H. ROBERTSON,
Attorneys for Plaintiff in Error.

Due service of the foregoing praecipe is acknowledged this 1st day of June, 1916.

P. H. CULLEN,
Attorneys for Defendant in Error.

4½ [Endorsed:] United States of America, State of Missouri,
ss: The Pennsylvania Fire Ins. Co. of Philadelphia, Plaintiff
in Error, v. The Gold Issue Mining & Milling Company, Defendant
in Error. Praecipe of Plaintiff in Error. Fred Herrington, Lewis &
Grant, David H. Robertson, Attorneys for Plaintiff in Error. Filed
Jun- 3, 1915. D. Allen, Clerk.

5 In the Supreme Court of Missouri, October Term, 1911.

Be it remembered, that heretofore, to-wit, on April 6th, 1912,
there was filed in the office of the clerk of this Court a certified copy
of judgment and order granting appeal from the Circuit Court of
Audrain County, Missouri, in a certain cause in which the Gold

Issue Mining and Milling Company was plaintiff-respondent, and Pennsylvania Fire Insurance — of Philadelphia was defendant, appellant, which said transcript of record is in words and figures as follows:

5½ STATE OF MISSOURI,
County of Audrain, ss:

Be it remembered that heretofore, to-wit: at the regular March Term, 1912, of the Audrain County Circuit Court, and on March 14, 15, 19 and 29, 1912, it being the 9th, 10th, 13th and 20th days of said Term, and before the Hon. James D. Barnett, Judge of the Eleventh Judicial Circuit of Missouri and Judge of the Audrain County Circuit Court, the following proceedings were had and appear of record, to-wit:

THE GOLD ISSUE MINING & MILLING Co., Plaintiff,
vs.

PENN. FIRE INSURANCE CO. OF PHILADELPHIA, Defendant.

Now on this March 14th, 1912, comes parties and files stipulation of facts in the above cause, and by consent this case The Pennsylvania Fire Insurance Company of Philadelphia, is called for trial instead of The Fidelity-Phoenix Fire Insurance Company of New York.

And comes now the parties, plaintiff with its Attorneys and defendant by and with its Attorneys and this cause being now called for trial both parties answer ready; thereupon comes the following jury to-wit: Jos. A. Adrian, J. T. Bosely, W. G. Pike, Marion Walker, T. F. Hess, Thomas Stowers, O. F. Ellis, M. S. McClintic, Ralph House, W. B. Langford, Wm. Prior, and A. K. Luckie, twelve good and lawful men from the body of Audrain County, who are duly sworn and empaneled to try this cause. And after hearing a portion of the evidence in above cause the hour of adjournment having arrived, upon order of Court said jury is excused until to-morrow morning, March 15, 1912, at nine o'clock, A. M.

And afterwards on the next day the following appears of record, to-wit:

6 THE GOLD ISSUE MINING & MILLING Co., Plaintiff,
vs.
PENN. FIRE INSURANCE CO. OF PHILADELPHIA, Defendant.

Now on this March 15th, 1912, come again the parties with and by their Attorneys, as well also the jury heretofore empaneled in the above cause, and after hearing all the evidence in the cause the instructions of the Court and the argument of the Counsel, said jury retires to their room to consider of their verdict, after due deliberation said jury returns into open court the following verdict:

"We, the jury find in favor of the plaintiff and we assess the

amount of its recovery at Twenty-Six Hundred, Eighty-nine and 57-100 Dollars (\$2,689.57) M. S. McClintic, Foreman."

It is therefore, considered, ordered and adjudged by the Court that plaintiff have and recover of and from the defendant herein, The Pennsylvania Fire Insurance Company of Philadelphia, the sum of Twenty six Hundred, Eighty Nine and 57-100 Dollars, (\$2,689.57) together with its costs herein laid out and expended and that execution issue therefor.

And afterwards at the same Term the following appears of record, to-wit:

THE GOLD ISSUE MINING & MILLING CO., Plaintiff,
vs.
PENN. FIRE INSURANCE CO. OF PHILADELPHIA, Defendant.

Now on this March 19th, 1912, comes defendant and files its motion for a new trial and also motion in arrest of judgment, in the above entitled cause.

7 And afterwards at the same Term the following appears of record, to-wit:

THE GOLD ISSUE MINING & MILLING CO., Plaintiff,
vs.
PENN. FIRE INSURANCE CO. OF PHILADELPHIA, Defendant.

Now on this 29th day of March, 1912, comes the plaintiff and enters its remittitur in the sum of Fifteen Dollars (\$15.00), from the amount of the verdict returned by the jury in this cause, which said remittitur is sustained by the Court and Judgment is ordered entered for plaintiff in the sum of Twenty-Six Hundred Seventy Four and Fifty-seven Hundredths Dollars, in the place and instead of \$2,689.57, which was the amount of the verdict returned by the jury.

It is therefore, considered, ordered, decreed and adjudged by the Court that the plaintiff have and recover of and from the defendant the sum of Twenty-six Hundred Seventy Four and Fifty-seven Hundredths Dollars (\$2,674.57), with interest thereon at the rate of six per cent per annum, together with its costs, and that plaintiff have execution issue therefor.

Now this day comes the parties by their Attorneys and defendant's motion for a new trial heretofore filed being submitted to the Court and being fully understood is overruled; and defendant's motion in arrest of judgment being submitted to the Court is also overruled; thereupon defendant files affidavit in appeal, which appeal is by the Court granted, and leave of Court is granted said defendant to file appeal bond herein in the sum of \$5,500.00, within ten days after the close of this Term of Court to be approved by the Clerk of this Court in vacation. And leave of Court is also granted Appellant to file Bill of Exceptions herein on or before June 18, 1912.

8 STATE OF MISSOURI,
County of Audrain, ss:

I, E. F. Elliott, Clerk of the Circuit Court within and for the County and State aforesaid, do hereby certify that the above and foregoing is a full, true and complete copy of the judgment and Order of Appeal in the case of The Gold Issue Mining & Milling Company vs. Pennsylvania Fire Insurance Company of Philadelphia, as fully as the same remains on file and of record in my office.

Witness my hand and official seal. Done at office in the City of Mexico, County and State aforesaid, this April 5, A. D. 1912.

[SEAL.]

E. F. ELLIOTT,

Clerk of the Audrain County Circuit Court.

9 In the Supreme Court of Missouri, Division No. I, October Term, 1914.

On February 22nd, 1915, the following further proceedings were had and entered of record in said cause:

"GOLD ISSUE MIN. & MILL. CO., Respondent,
 vs.

PENN. FIRE INS. CO. OF PHILA., Appellant.

Now at this day, it is ordered by the Court that the stipulation of the said parties to omit from the abstract of the record herein copies of certain decisions of the Supreme Court of Colorado, be and the same is hereby allowed."

Which said stipulation is in words and figures as follows:
 10 Which said stipulation to omit the printing of the Colorado decisions in the Supreme Court of Missouri, is in words and figures as follows:

In the Supreme Court of Missouri, Division No. I.

No. 17298.

THE GOLD ISSUE MINING AND MILLING COMPANY, Respondent,
 vs.
 THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
 Appellant.

Now come the respective parties in this cause, the appellant and the respondent, and state to the court that in the trial of said cause there were introduced in evidence numerous decisions of the appellate courts of the State of Colorado, which are evidence contained in the bill of exceptions filed in said cause; and the parties hereto, the appellant and the respondent, say that to print said decisions in the record of said cause will be a matter of great expense, and that all of said decisions are found in the library of the Supreme Court;

Wherefore the parties, the appellant and the respondent, move the court to grant the appellant leave to omit the said decisions and opinions of the appellate courts of Colorado, aforesaid, from the printed abstract of record to be filed in said cause, printing in lieu thereof in the abstract, the style of the case, the page and volume where *said* is reported, and move the court to consider said decisions as found in the Colorado Supreme Court Reports, the Colorado Appeal Reports and the Pacific Reporter, in the library of the Supreme Court, a part of the record in this cause just as if printed in said record.

FAUNTLEROY, CULLEN & HAY,
FRY & RODGERS,
Attorneys for Respondent.
FRED HERRINGTON,
DAVID H. ROBERTSON,
Attorneys for Appellant.

11

In the Supreme Court of Missouri.

Thereafter, to-wit, on March 15th, 1915, the appellant by attorney, filed its abstract of the record in said cause, which said abstract of the record is in words and figures as follows:

In the Supreme Court of Missouri, Division No. 1, April Term, 1915.

No. 17298.

THE GOLD ISSUE MINING AND MILLING COMPANY, Respondent,
vs.
THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
Appellant.

Appealed from the Circuit Court of Audrain County, Hon. J. D. Barnett, Judge.

Abstract of the Record.

Fred Herrington, David H. Robertson, for the Appellant.

12 In the Supreme Court of Missouri, Division No. 1, April Term, 1915.

No. 17298.

THE GOLD ISSUE MINING AND MILLING COMPANY, Respondent,
vs.
THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
Appellant.

Appealed from the Circuit Court of Audrain County, Hon. J. D. Barnett, Judge.

The Record Proper.

The following is an abstract of the record proper in the above entitled cause as it is shown by the Circuit Court records of Audrain County, and by the record entries of the clerk of said court.

During the regular June Term, 1911, on June 6, 1911, the plaintiff filed its petition, which petition, omitting the caption and signatures, is as follows:

13

Petition.

"Said plaintiff, The Gold Issue Mining and Milling Company, for its petition and cause of action against said defendant, alleges that, at all times herein stated, said plaintiff was, and now is, a corporation duly organized and existing under, and pursuant to the laws of Arizona; that at all of said times said defendant was and now is, a foreign corporation duly organized and existing under the laws of Pennsylvania, and at all of said times, said defendant, as such foreign Insurance Company and corporation, has been and now is, engaged in the general business of fire insurance, and at all of said times has been, and now is, duly licensed, as such foreign Insurance Company and corporation, to do business in the State of Missouri.

That on October 5, 1909, and at all times herein mentioned said plaintiff was the sole and unconditional owner of the property herein mentioned and described, and on October 5, 1909, said defendant did duly make and deliver unto said plaintiff its policy and contract of insurance whereby, it did, "in consideration of the stipulations herein named and of 74 12-100 Dollars Premium insure The Gold Issue Mining and Milling Company, for the term of one year from the 5th day of October, 1909, at noon, to the 5th day of October, 1910, at noon, against all direct loss or damage by fire except as hereinafter provided, to an amount not exceeding twenty-five hundred dollars, to the following described property while located and contained as described herein and not elsewhere, to-wit:

14

The Gold Issue Mining and Milling Co.

This policy being for \$— covers a pro rata part of each of the following items and subdivisions on property belonging to the insured, situate on their premises about two miles north of the City of Cripple Creek, Teller County, Colorado.

THE GOLD ISSUE MINING & MILLING COMPANY.

9

| Item. | Designation. | Class. | Roof. | Map. | Subdivision A, buildings. | Subdivision B, machinery. | Subdivision C, gold in process. | Subdivision D, electrical. | Total. |
|-------|-----------------------------|--------|-------|------|------------------------------|------------------------------|---------------------------------------|-------------------------------|---------------|
| 1 | Main Building | D-I C | Iron | A | 20,000 | 17,500 | 9,000 | 2,100 750 | 48,600 750 |
| 2 | Edwards Roaster | I C | Iron | B | ..... | ..... | ..... | ..... | ..... |
| 3 | Tram Motor Bldg. | I C | Iron | C | ..... | ..... | ..... | ..... | ..... |
| 4 | Transformer | I C | Iron | D | ..... | ..... | ..... | ..... | ..... |
| 5 | Blacksmith and Carpenter | I C | Iron | E | ..... | 300 | ..... | 150 | 550 |
| 6 | Shop | I C | Iron | F | 100 | ..... | ..... | ..... | 100 |
| 7 | Refining and Assay Building | B | Iron | G | 100 | ..... | ..... | ..... | ..... |
| | Office & Laboratory | D | Iron | H | 100 | ..... | ..... | ..... | ..... |
| | | | | | <hr/> 20,200 | <hr/> 17,800 | <hr/> 9,000 | <hr/> 3,000 | <hr/> 50,000" |
| | Grand total | | | | | | | | |

Further complaining, said plaintiff alleges that on August 13, 1910, and while said plaintiff was the sole and unconditional owner of said property, a fire occurred, which directly damaged and destroyed said property to the amount of one hundred and thirty-four thousand dollars (\$134,000.00), and by reason of said facts, said plaintiff did suffer and sustain a loss to the extent of said sum of one hundred and thirty-four thousand dollars (\$134,000.00).

That by the terms and conditions of said policy, it was expressly agreed and provided, as follows:

"Buildings.—The term building shall be taken to include its adjoining and communicating additions and platforms, its trestles and all its permanent fixtures, but shall not cover foundations, 15 walls, floors, or other portions thereof which are made of stone, concrete or cement. Where trestle is connecting two buildings insured under separate items then the same shall be considered as one-half belonging to each building.

Ore and gold in process.—The term Ore and Gold in Process shall be taken to include ore and all products derived therefrom by treatment or otherwise, including gold therein or in whatsoever form or association with other material the same may be, except gold which has been amalgamated or melted into buttons or bars.

Machinery.—The term machinery shall be taken to include boilers, pumps, engines, tanks, machines, machinery, piping and wiring, tools, implements, zinc, cyanide, fuel supplies, furniture, fixtures, scientific apparatus, fire extinguishing apparatus, and all other personal property incident to the business (not otherwise insured), while contained in building designated. This term shall not cover any stone, concrete or cement foundations for tanks, machinery or other items of equipment." Said policy is filed herewith.

That upon the happening of said fire and loss, said plaintiff did duly give defendant immediate notice thereof, as is called and provided for in said policy, and said plaintiff has duly performed all the terms and conditions of said policy, which by the terms thereof, it was called upon or was in duty bound to do or perform, and said plaintiff alleges that defendant has declared and informed said plaintiff that said policy was void and that defendant was not liable 16 thereon, and was not liable for anything by reason of said fire and loss, and has declared to plaintiff that defendant would not pay anything thereon, or therefor.

Further complaining, said plaintiff alleges that said policy is now due and payable to plaintiff, and that there is now due and owing from defendant to plaintiff, by reason of said facts, the sum of twenty-five hundred dollars, together with interest thereon from the date of said fire.

Wherefore, said plaintiff prays judgment against defendant for the sum of twenty-five hundred dollars, with six per cent (6 per cent) interest thereon from the date of said fire, as aforesaid, and for the costs and disbursements of this suit.

Thereupon during the regular June Term, 1911, on June 6, 1911, the clerk of the court issued the following writ of summons:

Summons.

STATE OF MISSOURI,
County of Audrain, ss:

I hereby certify that the foregoing is a true copy of the original petition now on file in my office in this cause.

Given under my hand and official seal at office in the City of Mexico, this 6th day of June, 1911.

[SEAL.]

E. F. ELLIOTT, Clerk,
 By PEARL M. MORRIS, D. C.

17 **STATE OF MISSOURI,**
County of Audrain, ss:

The State of Missouri to the Sheriff of Cole County, Greeting:

You are hereby commanded to summon The Pennsylvania Fire Insurance Company of Philadelphia, a corporation, so that it be and appear before the Judge of the Audrain Circuit Court on the first day of the next term thereof to be begun and held at the court house in the City of Mexico, Audrain County, Missouri, on the first Monday in September, 1911, to answer the Petition of The Gold Issue Mining & Milling Company, a corporation as set forth and alleged in its said petition, true copies of which are herewith sent, and thereof make due return as the law directs.

Witness, E. F. Elliott, clerk of said court, with the seal thereof hereunto affixed, at office in the City of Mexico, Mo., on this 6th day of June, 1911.

[SEAL.]

E. F. ELLIOTT, Clerk,
 By PEARL M. MORRIS, D. C.

To which writ of summons was attached a copy of the petition. Which said writ of summons was afterwards returned to the clerk and filed as a part of the record, with the return of the sheriff of Cole County, endorsed thereon, as follows:

Return of the Sheriff of Cole County.

STATE OF MISSOURI,
County of Cole, ss:

Return of Sheriff of Cole County, Mo.

Executed the within writ in the County of Cole, and State aforesaid, on the 7th day of June, 1911, upon the within named defendant The Pennsylvania Fire Insurance Company of Philadelphia, a corporation, by delivering a true copy of the within writ, together with a copy of the petition thereto attached, as certified to by the Clerk of the Circuit Court of Audrain County, Missouri, to Frank Blake, Superintendent of the Insurance Department of the State of Missouri, he being the person authorized by the law to acknowledge and receive and upon whom to serve process issuing out of the courts of the State of Missouri for and in behalf of said defendant, under and by virtue of said Section 7042 of the Revised Statutes of Missouri 1909.

Witness my hand this 7th day of June, 1911.

HENRY A. HAGENER,
Sheriff of Cole County, Mo.,
By A. B. WALTER, *Deputy.*

Fee, \$1.00 paid by ———. Circuit Clerk.

During the regular September Term, 1911, on September 4, 1911, the defendant filed a motion to quash writ and return.

Further during said September Term, 1911, on September 6, 1911, the court overruled defendant's motion to quash writ and return.

Further during said September Term, 1911, on September 14, 1911, waiting the action of the Supreme Court and its decision, this cause was ordered passed without action by this court.

In Vacation, on December 16, 1911, this cause was by the court continued, awaiting the action of the Supreme Court.

19 During the regular March Term, 1912, on March 4, 1912, the defendant filed its answer, and deposited with the clerk of this court the sum of \$80.05 as tender of premiums and interest paid by the plaintiff to the defendant on said policy; which answer, omitting caption and signatures, is as follows:

Answer.

"Now comes the defendant herein and after leave of court had and obtained, for its answer herein, says:

I.

The defendant herein admits that at all dates herein the plaintiff was and now is, a corporation duly organized and existing under and pursuant to the laws of Arizona and that at all of said times, such defendant was and now is a foreign corporation duly existing under the laws of the State of Pennsylvania and at all of said times, said defendant as such company and corporation has been and now is engaged in a general fire insurance business in the State of Colorado and also in the State of Missouri and was and now is licensed and authorized to do business in both of said states. Defendant says that the policy or contract of insurance issued was made and executed in the State of Colorado upon property located in the State of Colorado and further says that therefore said contract of insurance is a contract under the laws of the State of Colorado and not a contract under the laws of the State of Missouri.

That the said Frank Blake, Superintendent of the Insurance Department of the State of Missouri, upon whom service was 20 had in said cause, was not authorized by the laws of the State of Missouri to acknowledge or receive service of process issued from any court of record in the State of Missouri for this defendant in said cause of action, hence this court has no juris-

diction over this defendant nor the subject matter of this action, and Section 7042, Revised Statutes of Mo. 1909, does not apply to this action for the reason that said contract of insurance is a contract of the State of Colorado and not of the State of Missouri and the cause of action can only be maintained in the State of Colorado and said Section 7042 of the Revised Statutes of Missouri is unconstitutional and void because it denies to this defendant due process of law and is an effort to take the property of this defendant without due process of law and is therefore in conflict with Section 30 of Article II, of the Constitution of the State of Missouri, which provides that no person shall be deprived of property without due process of law and is in conflict with Section 1, Article XIV of the Constitution of the United States, which provides that no State shall make or enforce any law which shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Defendant further says that said Section 7042 was enacted by the General Assembly of the State of Missouri in the year 1885, as shown by Laws of Missouri, 1885, page 183, and that the title to said act is as follows:

“An act to Amend Section 6013, Article 4, of the Revised Statutes of Missouri of 1879, entitled ‘General Provisions’ relating to Insurance and Service of Legal Process Therein.”

Whereas in truth and in fact, said act of the Legislature did not amend said Section 6013 but repealed said section and enacted a new section in lieu thereof and is therefore in conflict with Section 28, Article IV of the Constitution of Missouri which provides that no bill shall contain more than one subject which shall be clearly expressed in its title and defendant says that the subject expressed in said title is contrary to the body of said act and that the subject of the body of the act is not expressed in the title either clearly or otherwise.

And defendant further says that said act is contrary to the terms of Section 34 of Article IV of the Constitution of Missouri which provides that:

“No act shall be amended by providing that designated words thereof be stricken out or that designated words be inserted, or that designated words be stricken out, and others inserted in lieu thereof; but the words to be stricken out or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended.”

Wherefore, defendant says that said Section 7042, Revised Statutes of Missouri, 1909, is unconstitutional and void and that the service had herein is void and this court has no jurisdiction over the defendant or over the subject matter of this action, and to entertain further jurisdiction in this cause, would be to deprive the defendant of its property without due process of law.

II.

The defendant admits that proofs of loss upon the said policy were received by the defendant and no objection to said proofs were made to the plaintiff, but denies that it accepted said proofs of loss as showing any liability upon its part under said policy.

III.

Defendant further admits that on the 5th day of October, 1909, it issued in the name of the plaintiff, its policy of fire insurance, which policy was numbered 698 upon certain items of property in said — mentioned and upon certain conditions therein mentioned, in a sum not exceeding two thousand five hundred dollars (\$2500.00) for a period of one year and defendant says that one of the items mentioned in said policy of insurance was what was designated as "Gold in Process" and which represented 18 per cent of the amount of the total insurance obtained by plaintiff on all of such property and defendant says that on that date, to-wit, the 13th day of August, 1910, no such items of property belonging to the plaintiff and covered by said insurance policy were in existence or destroyed.

IV.

For other and further defenses, defendant says that it was stipulated and agreed in the policy of insurance sued on, as well as being a condition thereof, that the said policy should be void if the subject of insurance was a manufacturing establishment, and it should cease to be operated for more than ten (10) consecutive days, or, if the hazard should be increased by any means 23 within the control or knowledge of the insured, unless otherwise provided by agreement endorsed thereon, or added thereto. Among the items of insurance covered by said policy were the main building and "Edwards Roaster," and it was warranted by the plaintiff by agreement added to the said policy that the said policy should be void if the said main building and "Edwards Roaster" was idle or not in operation for a period of more than thirty (30) days, without the written consent of the said defendant.

Defendant alleges that at the time of the fire mentioned in plaintiff's complaint, the said main building and Edwards Roaster was idle and not in operation, and had been in such condition for a period of at least six (6) months prior thereto and no consent in writing, or otherwise, had been given by the defendant company to continue the said policy in force, notwithstanding such a condition.

Defendant further says that it was stipulated and agreed in the Policy of Insurance issued, as well as being a condition thereof, if the subject of insurance should be personal property and be or become encumbered by chattel mortgage during the term of the policy, that the said policy should be void.

Defendant alleges that certain of the property covered by said policy of insurance, to-wit, One (1) Edwards Duplex Roasting Furnace with building; one (1) Edwards Cooler and ten horse-power electric motor with building; one (1) Evansville-Waddell Chillian Mill, were personal property and that, on the twenty-second day of October, 1909, the plaintiff executed a chattel mortgage upon the said property to one Joseph Peters, for the sum of \$25,000.00, which chattel mortgage was duly filed for record on June 10, 1910, in Book 140 at page 296, of the records of Teller County, Colorado, a reference to which records for a greater certainty is hereby made and no consent by writing added to said policy, or otherwise, was given by the defendant for the execution by the plaintiff of the said mortgage, and in and by the terms of the said policy of insurance the same became and was void by reason thereof.

Defendant further says that it was stipulated and agreed in the policy of insurance issued by defendant, as well as being a condition thereof, if the property insured should be or become encumbered by a mortgage or deed of trust, during the term of the policy or if the interest of the plaintiff (the insured), should be other than an unconditional and sole ownership, or if the subject of insurance was a building on grounds not owned by the plaintiff (the insured) in fee simple, that the said policy should be void.

Defendant alleges that all of the property covered by said policy of insurance was encumbered by a deed of trust given thereon to secure an indebtedness, said deed of trust being recorded in Book 116 at page 238, of the records of Teller County, Colorado, a reference to which records for greater certainty is hereby made; and said property was encumbered by said deed of trust on October 5th, 1909, the date upon which this defendant issued this policy of insurance upon said property and also upon 24½ August 13th, 1910. And defendant further alleges that

no consent by writing added to said policy, or otherwise, was given by the defendant for the encumbrance of said property by said deed of trust and said plaintiff was not the unconditional and sole owner of said property and did not own said property in fee simple, and in and by the terms of said policy of insurance, said policy became and was void by reason thereof.

Defendant further says that it was stipulated and agreed in the policy of insurance issued, as well as being a condition thereof, that in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss the policy should be and become void.

Defendant says that among the items of insurance covered by said policy of insurance was an item designated as Gold in Process, which was defined by the terms of the policy to include ore and all products derived therefrom by treatment or otherwise including gold therein or in whatsoever form or association with other material the same may be, except gold which has been amalgamated or

melted into buttons or bars; and the amount of such insurance was eighteen per cent (18), of the whole covered by said policy.

Defendant alleges that in making proof of loss, on account of this item, plaintiff, well knowing that there was no such loss, fraudulently and false- made oath to his proofs of loss that there was a loss of \$9,000 of Gold in Process, when there was no such loss, or, if any loss, it was but a small proportion of that amount claimed in the proofs of loss.

25 Wherefore, defendant says on account of the matters and things set forth in this paragraph, said plaintiff is not entitled to recover of this defendant and said policy thereby became and is void.

V.

For another defense to plaintiff's petition herein, defendant says that it was stipulated and agreed in the policy of insurance issued, as well as being a condition thereof, that the said policy should be void if the interest of the plaintiff (the insured) should be other than an unconditional and sole ownership, or, if the subject of insurance was a building on ground not owned by the plaintiff (the insured) in fee simple.

Defendant says that plaintiff was not, at the time of the alleged issuance of the said policy of insurance, the unconditional owner of the property covered by said policy, nor were the buildings covered by said policy on ground owned by plaintiff in fee simple, nor was it such owner at the time of the alleged fire set forth in plaintiff's petition, nor during any of the time intervening between the said alleged issuance of said policy and said fire.

That plaintiff is a corporation for profit having a capital stock divided into shares, organized under the laws of Arizona, and it had not at and before the time of the fire, nor until the tenth day of January, 1911, filed its Articles of Incorporation or Charter with the laws of Arizona, under which it was organized, or paid the

fee required by the statutes of Colorado, entitling it to
26 exercise any corporate powers or acquire or hold any real or personal property whatever within the State of Colorado, and had failed to do any of the things required by the statutes of Colorado entitling it to exercise such powers.

That on or before the fifth day of October, 1909, and for a long time prior thereto, in pursuance to its general purposes, plaintiff had been doing business within the State of Colorado, to-wit:

The business of reducing ores in Teller County, State of Colorado, where it had established a plant, and such other incidental business connected therewith as usually attends such operations, contrary to the laws and statutes of the State of Colorado in such case made and provided and, although not actually operating the said plant during all the time intervening between the said date and the 13th day of August, 1910, it continued to do business within the State of Colorado contrary to and in contravention of the laws and Statutes of Colorado in such case made and provided.

That the statutory laws in force within the State of Colorado during all the times mentioned in plaintiff's petition and since the year 1901, limiting the powers of corporations organized under the laws of other states and territories than that of Colorado, and regulating the doing of business within the State of Colorado by such corporations, are as follows, namely: Sections 904 and 910 of the Revised Stat. of Colorado of 1908, enacted by the legislature of the State of Colorado in 1901:

27 Sec. 904. Fees of foreign corporations—Shall not do business until fees are paid.—Sec. 60.

Every corporation, joint stock company or association, incorporated by or under any general or special law of any foreign state or kingdom, or any state or territory of the United States, beyond the limits of this state, having a capital stock divided into shares, shall pay to the secretary of the state, for the use of the state, a fee of thirty dollars in case the capital stock which said corporation, joint stock company or association is authorized to have, does not exceed fifty thousand dollars; but in case the capital stock thereof is in excess of fifty thousand dollars, the secretary of state shall collect the further sum of thirty cents on each and every thousand dollars of such excess, and a like fee of thirty cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of the certificate of incorporation, articles of association or charter of said corporation, joint stock company or association in the office of the secretary of state, and no such corporation, joint stock company or association shall have or exercise any corporate powers or hold or acquire any real or personal property, franchises, rights or privileges, or be permitted to do any business or prosecute or defend in any suit in this state, until the said fee shall have been paid.

Sec. 910. Certificate of Authority—Fee—Shall not transact business without.—Sec. 66.

No corporation, joint stock company or association, incorporated by or under any general or special law of this state, or by or 28 under any general or special law of any foreign state or kingdom or of any state or territory of the United States, beyond the limits of this state, shall exercise any corporate powers or acquire or hold any real or personal property, or any franchises, rights or privileges, or do any business or prosecute or defend in any suit, in this state until it shall have received from the secretary of this state a certificate setting forth that full payment has been made by such corporation, joint stock company or association, of all fees and taxes prescribed by law to be paid to the Secretary of State, and every such corporation, joint stock company or association shall pay to the Secretary of State for each such certificate, a fee of five dollars. Nothing in this section shall apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes.

That at the time of the enactment of said Sections 904 and 910 of the Rev. Stat. of Colo., of 1908, a similar statute covering the same subject, in the year 1895, had been enacted and was in force and had

received a judicial construction by the Supreme Court of the State of Colorado, wherein it was held that a domestic corporation or one organized under the laws of Colorado having failed to pay the fee required by the statute then in force could not acquire, take, or hold any title whatever to property until such fee had been paid.

That such decision of the Supreme Court is set forth in the case of Jones v. Aspen Hardware Co., 21st of Colorado Reports at 29 page 263, and the statute under consideration which is hereby pleaded, is fully and correctly set forth in said decided case.

That Colorado is a common law state, and the rules of construction are the same that obtains in other states to the effect that where a prior statute has received a judicial construction by the Supreme Court of the state, then, it is presumed, in enacting a subsequent statute covering the same or similar subjects, that the legislature intended to adopt, as a part of the latter statute, the construction of the former statute.

The following additional authorities are cited and pleaded and defendant alleges that they show the state of the law in Colorado and its public policy towards corporations foreign to the state:

Miller v. Williams, 27 Colo. 38.

Iron Silver Mining Co. v. Cowie, 31 Colo. 450.

Trust Co. v. Leschen & Sons, 41 Colo. 299.

Ohio Colorado Co. v. Elder, 47 Colo. 63.

Western Electrical Co. v. Pickett, 118 Pac. 988 (not yet reported in Colorado Reports).

Wherefore, defendant says that said policy of insurance is void and to permit the plaintiff to recover would be not only contrary to the law of the State of Colorado, but to the law and the public policy of the State of Missouri, as contained in its statutes and decisions.

VI.

Defendant further says that on the 5th day of October, 1910, in the City of Cripple Creek, in the County of Teller, State of Colorado, this defendant tendered to the plaintiff the amount of 30 premium paid by it on the policy of insurance mentioned in plaintiff's petition, together with interest thereon, to-wit, the sum of seventy-four and 12-100 dollars (\$74.12) principal and five and 93-100 dollars (\$5.93) interest as a return of the premiums paid by the plaintiff to defendant on the said policy of insurance. That the defendant has been since said time, and still is, ready to pay the same to the plaintiff and now pays the same into the said court for the said plaintiff and in order to keep its tender good.

VII.

Defendant further answering, denies each and every allegation of plaintiff's petition not herein specifically admitted to be true.

Wherefore, defendant says on account of the matters and things above set forth, the plaintiff is not entitled to recover and hence prays judgment with costs of this action."

During the regular March Term, 1912, on March 4, 1912, the defendant filed a motion to compel plaintiff to file instrument sued upon; also motion to dismiss for failure to file cost bond in the above entitled cause.

Further during said March Term, 1912, on March 5, 1912, the plaintiff filed its motion to make the answer more definite and certain.

Further during said March Term, 1912, on March 5, 1912, the policy sued upon having been filed, the defendant's motion to file instruments sued upon was overruled. On the same day the court gave plaintiff leave to deposit \$300.00 with the clerk to secure the costs in this cause, or in lieu of deposit plaintiff to file cost bond to cover costs. Motion to dismiss taken under advisement, to be overruled if deposit be made or bond given.

Further during said March Term, 1912, March 7, 1912, the plaintiff deposited \$300.00 with the clerk to secure costs in above entitled cause, and the defendant's motion to dismiss was overruled. On the same day the plaintiff's motion to make answer more definite and certain was overruled, and the plaintiff filed its reply, which reply, omitting the caption and signatures, is as follows:

Reply.

I.

"The said plaintiff for its reply to the answer of said defendant admits the allegation of said defendant in paragraph 1 of its answer, that plaintiff was and now is a corporation duly organized and existing under and pursuant to the laws of Arizona, and plaintiff alleges that at all times mentioned in the petition and herein mentioned, it has had its home office in Arizona, and plaintiff admits that such defendant was at all of said times, and now is, a foreign corporation existing under the laws of the state mentioned in said answer, and that at all times mentioned in the petition and answer said defendant has been and now is engaged, licensed and authorized to do business in both the states of Colorado and Missouri.

Plaintiff admits that the policy or contract of insurance was made and executed in Colorado, upon property located in Colorado,
32 but plaintiff denies that the said contract of insurance is a contract under the laws of Colorado.

Plaintiff denies that said Frank Blake, Superintendent of the Department of insurance of the State of Missouri, upon whom service was had in this cause, was not authorized by the laws of Missouri to acknowledge or receive service of process, in this cause, but plaintiff alleges that said Blake, superintendent as herein stated, was duly authorized to be served and was duly authorized to receive service of the writ of summons and process thereof, in this action, and plaintiff alleges that upon the return day of the writ of summons herein,

said defendant at the September, 1911, term of said court, upon the return day of said writ voluntarily appeared generally in this action and submitted to the jurisdiction of this court, and plaintiff denies that this court, has no jurisdiction over this defendant nor the subject matter of this action, but plaintiff alleges that this court has jurisdiction over both the person of defendant and the subject-matter of the action, and plaintiff denies that section 7042, mentioned in the answer of defendant does not apply to this action for the reason stated in said answer or because of any other reason, whether as is stated in said answer or otherwise. Plaintiff denies that this cause of action can only be maintained in the State of Colorado, or that said Statutes of Missouri, or any of them, are unconstitutional or void, for or by reason of the allegations of the answer, herein or otherwise.

Plaintiff denies that any of said statutes or laws which are mentioned in the answer, herein, are void, or in conflict with the
33 Constitution of the State of Missouri, or of the United States,
or are in conflict with or in violation of any section, or article or provision of said Constitution, or either of them.

Said plaintiff admits that said section 7042 was enacted by the State of Missouri, but denies any knowledge or information sufficient to form a belief whether said section is shown by the Laws of Missouri, 1885, page 183, or whether the title thereof is, as is set forth in said paragraph 1 of said answer, or whether said act of the Legislature did not amend said section 6013, but plaintiff denies that it repealed said section or enacted a new section in lieu thereof, as is stated in said paragraph 1 of said answer, and plaintiff denies that any of said sections or acts of the Missouri Legislature are in conflict with any article or section of the Missouri Constitution, whether as is stated in the said answer or otherwise, and plaintiff denies that any subject whether as is stated in said answer, or otherwise, is contrary to the body of any act, or that the subject of the body of the act is not expressed in the title. Said plaintiff denies that said alleged act, which is mentioned in said paragraph 1 of said answer of defendant, is contrary to the terms of Section 34 of Article 4 of the Missouri Constitution.

Plaintiff denies that section 7042 is unconstitutional or void, or that the service had herein is void, or that this court has no jurisdiction over the defendant or over the subject matter of this action.

Plaintiff denies that defendant will be deprived of its property without due process of law, if this court shall entertain further jurisdiction in these causes.

Plaintiff admits defendant's allegation in paragraph 2 of its answer, wherein defendant admits that proofs of loss upon the said policy were received by defendant and defendant made no objection to said proofs, but plaintiff denies that defendant did not accept said proofs as showing liability on its part under said policy.

III.

Plaintiff admits the allegation of the answer contained in paragraph 3 thereof, that on October 5, 1909, defendant issued its policy in the name of plaintiff and that one of the items mentioned in said policy was designated as "Gold in Process," but plaintiff denies any knowledge or information sufficient to form a belief, as to whether it represented 18 per cent of the amount of the total insurance obtained by plaintiff, but plaintiff alleges the facts in regard to said insurance and said insured property are as is set forth in the petition herein, and not otherwise, and plaintiff denies that at that date (Aug. 13, 1909) no such items of property belonging to plaintiff and covered by said insurance policy was in existence or was not destroyed, but plaintiff to the contrary, alleges that the facts in regard thereto are as is set forth in the petition herein.

IV.

Plaintiff admits that said policy contained the stipulation that said policy should be void if the subject of insurance was a manufacturing establishment, and if it should cease to be operated for 35 more than thirty consecutive days, or if the hazard should be increased by any means within the control or knowledge of the insured, but plaintiff denies that the insured property was a manufacturing plant; plaintiff admits that, among other property and things covered by said insurance policy of defendant, was the main building, which is mentioned in the petition, but plaintiff denies said roaster was included in, or was covered by said policy, and plaintiff admits that the policy provided it should be void, if said main building was idle or not in operation for a period of thirty days, and plaintiff admits that said building was not in operation for a period of six months prior to the fire, but plaintiff alleges that at the time said policy was written and at all times intervening from that time, until said fire, said defendant was duly informed of such facts, and of the exact condition thereof, and defendant consented thereto and instructed plaintiff that said insurance was all right and was and would be continued in full force and effect, and took, received and kept the premium therefor from plaintiff and kept the same without any objection, and expressed no objection to any of said facts, but agreed to and continued its said insurance in full force and effect, with full notice of said facts, and did duly notify plaintiff that its said insurance would be continued in full force and effect, plaintiff alleges. That by reason of said facts herein set forth defendant is estopped to claim said policy is void, and defendant waived any such claim, as is set up in its said answer, to declare said policy void, because said property was not in operation.

36 Plaintiff also admits that the policy provided, if the subject of insurance be personal property, such policy would be void if it be or become encumbered by a chattel mortgage, but plaintiff alleges that said chattel mortgage to said Joseph Peters, mentioned in said answer, had been fully paid off and released before said insurance was taken out and before said fire, and plaintiff denies that

said property or any of it, mentioned in the answer herein as being in said mortgage, was ever encumbered at any time between the period from the time of the writing of said policy to the time of said fire, and plaintiff denies that by reason thereof, or by reason of any fact or circumstance, did said policy become, nor was it void. Plaintiff alleges that said defendant was, at all times, fully informed of said mortgage and consented thereto. Plaintiff admits it was stipulated in said policy that in case of fraud or false swearing by plaintiff, the policy should be void; also that among the items of insurance which was covered by said policy was an item designated as "Gold in Process," which was defined by the terms of the policy to include ore and all products derived therefrom by treatment or otherwise, including gold therein or in whatever form or association with other material the same may be, except gold which has been amalgamated or melted into buttons or bars, but defendant denies any knowledge or information sufficient to form a belief whether the amount of such insurance was 18 per cent of the whole covered by said policy, but alleges that the facts in regard thereto are as is stated in the petition.

37 Plaintiff denies that in making its proofs of loss, or in any other matter or thing, plaintiff ever knowingly or falsely, or otherwise, made any false oath or statement, either as is stated in said answer of defendant, or otherwise, but plaintiff alleges that the facts set forth in said proofs of loss were true, and believed to be true, by the parties making the same, and plaintiff denies that by reason of anything stated in the answer, herein, plaintiff is not entitled to recover, or that said policy is void.

V.

Plaintiff admits the policy contained the stipulation regarding ownership, which is set forth in the first four lines of paragraph 5 of defendant's answer, but plaintiff denies that it was not such owner, as is called for by said policy, of the property covered by said policy, and denies that plaintiff was not a fee-simple owner of the ground, upon which it stood at the time mentioned in the petition and answer and plaintiff alleges that the facts in regard thereto are as is set forth in the petition herein.

VI.

Plaintiff denies that all the property covered by said policy of insurance was ever encumbered by a deed of trust, but alleges that prior to the issuance of said policy a portion thereof was encumbered by a chattel mortgage, and that the same was recorded in book 116 at page 238, of the records of Teller County, mentioned in defendant's answer but plaintiff alleges that at the time said insurance was issued and before said fire and loss mentioned in the petition 38 herein, said mortgage and the debt secured thereby were fully paid and satisfied, and plaintiff denies that plaintiff was not the sole or unconditional owner of said property, or did not own said property in fee simple, whether as is stated in said answer or other-

wise, but plaintiff alleges that at all times mentioned in said petition and said answer plaintiff was the sole and unconditional owner of said insured property and of the land on which the same was located. Plaintiff admits that it is a corporation organized under the laws of Arizona, but plaintiff denies that it had not at or before the time of the fire filed its articles of incorporation or charter with the laws of Arizona, and plaintiff denies that it was not entitled to exercise any corporate powers or acquire or hold any real estate or personal property within the State of Colorado, or had failed to do any of the things required by the statutes of Colorado entitling it to exercise such powers.

Plaintiff denies that on or before the fifth day of October, 1909, or for a long time prior thereto, in pursuance to its general purposes, or otherwise, it had been doing business within Colorado contrary to or in contravention of the laws of Colorado, either as is stated in said answer, or otherwise.

Plaintiff admits that at all times mentioned herein, section 904 was the statute law of Colorado but plaintiff denies any knowledge or information sufficient to form a belief as to whether section 910, mentioned in said answer, was the statute law of Colorado or was in force, as is stated in said answer or otherwise.

39 Plaintiff denies that at the time of the enactment of sections 904 or of 1910, aforesaid, if said section 1910 was ever enacted or was the law of Colorado, which plaintiff denies, a similar statute covering the same subject, in the year 1895, or in any year, had been enacted or was in force or effect or ever had received any construction by the Supreme Court of Colorado, wherein it was held that any such corporation as is mentioned in said answer having failed to pay the fee stated herein could not acquire, or take or hold any title to property until such fee had been paid, and plaintiff denies any knowledge or information sufficient to form a belief whether any such decision as *Jones v. Aspen Hardware Co.*, 21 Colorado Reports, at page 263, was ever rendered by said Supreme Court.

Plaintiff admits that Colorado is a common law state, but denies that the rules of construction are the same that obtain in other states to the effect that where a prior statute has received a judicial construction by the Supreme Court of the State, that it is presumed, in enacting a subsequent statute covering the same or similar subjects, that the Legislature intended to adopt as a part of the latter statute, the construction of the former statute. The plaintiff admits that the Supreme Court of Colorado has decided the case of the *Western Electrical Co. v. Pickett*, 118 Pacific Reporter, 988, which is mentioned and plead in defendant's answer, but plaintiff denies any knowledge or information sufficient to form a belief, whether any of the other authorities which are mentioned in said answer of defendant were ever decided or determined by the Supreme Court of

40 Colorado, or not.

Plaintiff denies that said policy is void, or that to permit plaintiff to recover herein would be contrary to the laws of Colorado, or to the law of public policy of Missouri, whether as is stated in said answer or otherwise.

VII.

Said plaintiff further replying alleges that it was duly assessed by the proper officers of the State of Colorado and County of Teller, for taxes upon said property and that upon which said insured property stood, as the owner thereof, and on August 26, 1909, said plaintiff did duly pay to the Treasurer of Teller County, State of Colorado, the state and county taxes upon said property amounting to one hundred and fifty-seven and 35-100 dollars (\$157.35); that said State of Colorado and County of Teller have ever since kept said taxes; that on March 1, 1910, said plaintiff, having been theretofore duly assessed for taxes on said property, by the State of Colorado and County of Teller, did pay into the treasurer of Teller County, Colorado, taxes on said property in the sum of two hundred and sixteen and 66-100 dollars (216.66), *did pay unto the said treasurer the said sum of \$216.66*, and that said County of Teller and State of Colorado have ever since kept said taxes.

Further replying said plaintiff alleges that on or about November 4, 1907, in passing upon and interpreting the meaning of section 904, which is mentioned in the answer of said defendant, the 41 Supreme Court of the State of Colorado did hold and declare the law of the State of Colorado to be that:

Where a foreign corporation actually complies with the Act of April 6, 1901 (Laws 1901, p. 116, c. 52), prescribing the terms on which a foreign corporation may do business within the state, and prohibiting the exercise of corporate powers or the prosecutions or the defense of actions until the required fee shall have been paid and the prescribed certificate obtained, subsequent to the commencement of an action on a contract made with a domestic corporation, it may maintain the action and enforce the contract.

International Trust Co. v. Leschen & Sons Rope Co., 92 Pac. 727.

Said plaintiff alleges that long prior to the commencement of this suit said plaintiff corporation had duly complied with all the laws of the State of Colorado, and had paid all the fees which were required by the laws of Colorado of a foreign corporation to be paid, and had been duly licensed by said State of Colorado to make contracts in the State of Colorado, and to perform the same and to sue upon *and* all such contracts, and to own and hold property in said state and which said decision of the Supreme Court of Colorado is as follows:

INTERNATIONAL TRUST CO.

vs.

A. LESCHEN & SONS ROPE CO. et al.

Appeal from District Court, Dolores County; James L. Russell, Judge.

Action by the A. Leschen & Sons Rope Company against the International Trust Company and another. From a judgment 42 for plaintiff, defendant International Trust Company appeals. Affirmed.

A. Leschen & Sons Rope Company, appellee, and herein referred to as plaintiff, was at the time of the transaction involved in this controversy a corporation organized under the laws of the State of Missouri, with its plant and office in St. Louis, Missouri, and was engaged in selling goods in the State of Colorado and other states of the Union. On August 17, 1901, in pursuance of a sale made by one of its traveling salesmen, it entered into a written contract at the town of Rico, Colorado, with the Pro Patria Mining & Milling Company, a corporation organized under the laws of this state, to furnish certain manufactured materials and supplies f. o. b. St. Louis, Missouri, to be used by the milling company in the erection and construction of a wire rope tramway which the latter company was about to build upon its property and right-of-way from or near its group of mines in Dolores County, Colorado, to a concentrating plant about to be built by the milling company at Rico, at and for the agreed price of \$2,775, payable 50 per cent on receipt of bill of lading, and 50 per cent on final delivery of materials. These materials and supplies were furnished between August 17 and December 31, 1901. On September 1, 1901, the Pro Patria Mining & Milling Company executed a trust deed on all its property to the International Trust Company, a corporation organized under the laws of Colorado, to secure a certain bond issue. This trust deed was re-

corded September 18, 1901. On January 22, 1902, the plaintiff filed a lien statement under the provisions of our mechanic's lien law. On February 8, 1902, the plaintiff filed a complaint in the District Court of Dolores County to recover the sum of \$3,016.74, the balance due for the materials aforesaid, and for other materials subsequently ordered and furnished, averring that the materials and supplies were furnished by plaintiff and used by the milling company in the erection and construction of the tramway. The appellant, the International Trust Company, was made a party to the action because it claimed some interest in the property sought to be subjected to the mechanic's lien by virtue of the lien created by the trust deed aforesaid. Prayer for judgment for \$3,016.74 against the Pro Patria Mining & Milling Company; that the same be adjudged a lien upon the property and premises described in the lien statement prior in time and right to the lien of the trust deed; that the property and premises be sold and the proceeds applied to the payment of the same. The defendants filed separate answers, setting up (1) that said plaintiff had never filed with the Secretary of State a copy of its charter or of its certificate of incorporation; (2) that said plaintiff had not filed with the Secretary of State a certificate designating its principal place of business and an agent upon whom process might be served, and that plaintiff had not complied with the requirements of sections 4 and 10 of "An act relating to corporations, and prescribing certain fees to be paid by corporations, foreign and domestic, and to repeal certain acts and all acts and parts of acts in conflict therewith," approved April 6, 1901.

Laws 1901, pp. 118, 121, c. 52.

Sec. 4. Every corporation, joint stock company or association, incorporated by or under any general or special law or any foreign state or kingdom, or any state or territory of the United States, beyond the limits of this state, having a capital stock divided into shares, shall pay to the Secretary of State, for the use of the state, a fee of thirty dollars in case the capital stock which said corporation, joint stock company or association is authorized to have does not exceed fifty thousand dollars, but in case the capital stock thereof is in excess of fifty thousand dollars the Secretary of State shall collect the further sum of thirty cents on each and every thousand dollars of such excess, and a like fee of thirty cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of the certificates of incorporation, articles of association or charter of said corporation, joint stock company or association in the office of the Secretary of State, and no such corporation, joint stock company or association shall have or exercise any corporate powers or hold or acquire any real or personal property, franchises, rights or privileges, or to be permitted to do any business or prosecute or defend in any suit in this state until the said fee shall have been paid.

Sec. 10. No corporation, joint stock company or association incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom or of any state or territory of the United States, beyond
45 the limits of this state, shall exercise any corporate powers or acquire or hold any real or personal property, or any franchises, rights or privileges, or do any business, or prosecute or defend in any suit in this state until it shall have received from the Secretary of this state a certificate setting forth that full payment has been made by such corporation, joint stock company or association of all fees and taxes prescribed by law to be paid to the Secretary of State, and every such corporation, joint stock company or association, shall pay to the Secretary of State for each such certificate, a fee of five dollars. Nothing in this section shall apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes."

The plaintiff filed replications to these answers, averring that its headquarters and principal place of business — in St. Louis, State of Missouri; that it had no established agency or place of business in Colorado; that it had traveling salesmen who are continuously traveling through the various states and territories of the United States; that the orders for the appurtenances and materials mentioned in the complaint were taken by one of its traveling salesmen while traveling through the State of Colorado, at the instance of the milling company, and were sold to be delivered to the milling company on board the cars at St. Louis, and were to be paid for at the City of St. Louis, in the State of Missouri, and denies that the transaction described in the complaint, out of which the action *arise*, constituted doing business in the State of Colorado within the meaning of
46 the foregoing statutes. On May 19, 1904, a supplemental and further reply to the answers were filed, setting forth that

on, to-wit, the 23rd day of October, A. D., 1903, the plaintiff did comply with all the requirements of the statute, and had done all things necessary to qualify and authorize the plaintiff corporation to transact business in the State of Colorado, and to sue and defend all suits in the courts of said state. Upon the trial it was expressly stipulated that all the facts in this supplemental reply were true. There was no controversy as to the indebtedness of the milling company to the plaintiff and that there was \$3,577.87 due from said company to the plaintiff. Appellant moved for judgment on the pleadings. The court overruled said motion and sustained a motion of plaintiff for judgment against the milling company for the amount claimed, whereupon testimony was taken on the part of plaintiff in support of its mechanic's lien claim, and also as to the priority of such lien to the lien of the trust deed. Appellant excepted to the overruling of its motion for judgment, and also objected to the introduction of evidence in support of the mechanic's lien claim, upon the ground that plaintiff had failed to comply with the statutes of the state, and had no right to transact business in the state, or to acquire a lien upon the property either at the time of instituting the suit or the filing of the lien statement. A final decree was rendered in favor of plaintiff against the milling company for the amount aforesaid, and adjudging and decreeing to it a lien upon the tramway and the premises described in the complaint for the amount agreed
47 upon to date from September 1, 1901. To reverse this judgment, the International Trust Company brings the case here on appeal.

MACBETH & MAY,
For Appellant.
L. W. ALLEN AND
GOUDY & TWITCHELL,
For Appellees.

GODDARD, J. (after stating the facts as above) :

1. The legislature has power to prescribe the terms and conditions upon which foreign corporations may do business within the state, and require a compliance with such terms and conditions as a condition precedent to their invoking the jurisdiction of its courts. In *Paul v. Virginia*, 8 Wall. (U. S.), 168, 181, 19 L. Ed. 357, Mr. Justice Field, speaking for the court, said: "The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created * * *. The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They
48 may exclude the foreign corporations entirely. They may

restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion."

2. It is also well settled that, in exercising such power, the Legislature may not place any restrictions or impose any burdens upon interstate commerce. As was said in *Lyng v. State of Michigan*, 135 U. S. 161, 166, 10 Supt. Ct. 725, 726, 34 L. Ed. 150: "We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subject of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

3. The controlling and decisive question presented for our determination is whether the transaction out of which this controversy arises constitutes interstate commerce. That it does is abundantly shown by numerous cases, among them *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 737, 5 Sup. Ct. 739, 28 L. Ed. 1137; *Robbins v. Shelby Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Caldwell v. N. Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368;

49 *Lelop v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785; *Mearshon & Co. v. Lumber Co.*, 187 Pa. 17, 40 Atl. 1019, 67 A. M. St. Rep. 560; *Coit & Co. v. Sutton*, 102 Mich. 324, 327, 60 N. W. 690, 25 L. R. A. 819; *Rock Island Plow Co. v. Peterson*, 93 Minn. 356, 101 N. W. 616; *Kindal v. Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; *Miller & Co. v. Goodman*, 91 Tex. 41, 40 S. W. 718. The above and many other decisions of the Supreme Court of the United States and of the highest State tribunals fully establish the rule that a corporation of one State may send its agents to another to solicit orders for its goods, or contract for the sale thereof, without being embarrassed or obstructed by State requirements as to taking out licenses, filing certificates, establishing resident agencies, or like troublesome or expensive conditions. The case of *Robbins v. Shelby Taxing District* is one of the leading cases on this subject. It was tried upon an agreed statement of facts as follows: "Sabine Robbins is a citizen and resident of Cincinnati, Ohio, and on the — day of —, 1884, was engaged in the business of drumming in the taxing district of Shelby County, Tennessee, i. e., soliciting trade by the use of samples for the house or firm of 'Rose, Robbins & Co.', doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio. While engaged in the act of drumming for said firm, and for the claimed offense of not having taken out the required license for doing said business, the defendant, Sabine Robbins, was arrested by one of the Memphis or taxing district police force, and was carried before the Honorable D.

P. Haddan, president of the taxing district, and fined for the offense of drumming without a license. It is admitted the firm of 'Rose, Robbins & Co.' are engaged in the selling of paper, writing materials, and such articles as are used in the book stores of the taxing district of Shelby County, and that it was a line of such articles for the sale of which the said defendant herein was drumming at the time of his arrest." The court held upon these facts that the statute of Tennessee of 1881, enacting that "all drummers and all persons not having a regular licensed house of business in the taxing district 'of Shelby County,' offering for sale, or selling goods, wares or merchandise therein by sample, shall be required to pay to the county trustee the sum of \$10 per week, or \$25 per month, for such privilege," was void as against Robbins. The opinion of the court was delivered by Mr. Justice Bradley, in the course of which he said (page 494 of 120 U. S., page 594 of 7 Sup. Ct. 30 L. Ed. 694): "In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject. In view of these fundamental principles, which are to govern

51 our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restrictions upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer or a merchant of one state to sell his goods in another state without in some way obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may undoubtedly be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may perhaps safely take his goods to the City of New York, and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands of articles, which no person would think of exporting to another state without first procuring an order for them. It is true a merchant or manufacturer in one state may erect or hire a warehouse or store in another state in which to place his goods and wait the chances of being able to sell them. But this would require a warehouse or store in every state with which he might desire to trade. Surely he cannot be compelled to take this inconvenient and expensive course. In certain branches of business he may adopt it with advantage. Many manufacturers do open

52 houses or places of business in other states than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would

be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other states? Must he sit still in his factory or warehouse, and wait for the people of those states to come to him? This would be a silly and ruinous proceeding. The only way, and the one perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce is to speak, at least, unadvisedly and without due attention to the truth of things." In *Miller & Co. v. Goodman*, it is said: "The statute is not invalid because it violates any right of the corporation to do business in this state, but is void if so applied, because the State Legislature had no power to make such provisions applicable to interstate commerce. Such legislation would be equally void whether applied to natural persons, citizens or other states, or corporations created by such other states. It is the character of the business transacted, over which the state has no authority which renders its action a nullity."

In *Coit & Co. v. Sutton*, the findings of fact show that plaintiff was engaged in the business of shipping from Illinois goods manufactured in that

53 state to its customers in Michigan on orders given by mail, or taken by its agents in Michigan. At the time of making the sale there under consideration the plaintiff had not filed articles of association in that state, and had not paid to the Secretary of State the franchise fee as prescribed by the statute. The court had under consideration the validity of a judgment recovered by the plaintiff corporation for lead sold in pursuance of a written contract with the defendant, which defendant refused to receive, claiming the contract to be void. It was there said: "The law in question imposes a tax upon corporations for the privilege of doing business in Michigan. It is a tax upon the occupation of the corporation, with a provision that all its contracts shall be void until the tax is paid, which, if enforced, would embarrass plaintiff in its commerce with the inhabitants of Michigan. It must therefore be held that the act in question does not apply to foreign corporations whose business within that state consists merely of selling through itinerant agents, and delivering commodities manufactured outside of this state." In *Cooper Mfg. Co. v. Ferguson*, Mr. Justice Matthews used this language: "It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicile in that state; and to prohibit it from carrying on within that state its business of manufacturing machinery; but it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for

54 that would be to regulate commerce among the states." In

Kindel v. Lithographing Co., Chief Justice Hayt, speaking for this court, said: "In this case appellee contracted to make the calendars at its place of business in Wisconsin, and deliver them to appellant in Colorado. To give the State Constitution and statute the construction claimed by appellant would be to permit a state to

regulate commerce among the states, authority for which is conferred exclusively upon Congress. U. S. Const., Art. 1, Sec. 8. See opinion by Mr. Justice Matthews in *Cooper Manufacturing Company v. Ferguson.*" Under the ruling of these cases, which we accept as a correct interpretation of statutes like ours, it must be held that the sale and delivery of the materials and supplies mentioned in the complaint did not constitute doing business within the intendment of the sections of our statute above quoted. It therefore necessarily follows that, if the plaintiff was not required to comply with the terms of the statute in order to enable it to transact the business complained of, it had a right to invoke the aid of the courts in the collection of the indebtedness accruing to it by reason of such transaction. *Wolff Dryer Co. v. Bigler & Co.*, 192 Pa. 466, 471, 43 Atl. 1092; *Spry Lumber Co. v. Chappell*, 184 Ill. 539, 56 N. E. 794; *Miller & Co. v. Goodman*, *supra*. In the latter case it is said: "If the corporation was not required to comply with the terms of Article 745, Rev. St. 1895, then the prohibition against maintaining a suit contained in article 746 would not apply to it; and it is unnecessary for us to discuss the question raised by counsel for appellants as to the power of 55 the state to prohibit a corporation to sue in the courts of such state."

4. After the commencement of the suit, and before trial, the plaintiff fully complied with all the requirements of our statutes, and established an agency and place of business in the state. If, therefore, it could be held that the transaction under consideration came within the inhibition of the statutes, said subsequent compliance would entitle plaintiff to maintain this action. The statute prohibits the prosecution or defense of an action "until the fee shall have been paid," and the prescribed certificate obtained. The prohibition is therefore only provisional, and may be removed at any time under the terms of the act itself. *Caesar v. Capell* (C. C.), 83 Fed. 403; *Asphalt Co. v. Mayor*, 155 N. Y. 373, 49 N. E. 1043; *Carson-Rand Co. v. Stern*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420; *Ryan Live Stock & Feeding Co. v. Kelly*, 71 Kan. 874, 81 Pac. 470. In the latter case, the Supreme Court of Kansas, deciding the question here presented, said: "The plaintiff in this case is a private foreign corporation and it was conceded upon a trial that it had not at the commencement of the action complied with the corporation laws of the State of Kansas; but it was proven that prior to the trial in this case it had complied therewith, and had received a certificate from the Secretary of State evidencing that fact. The sole question presented in this case is whether the corporation, not having filed the statement and procured the certificate required by law before the commencement of the action, could comply with the law 56 thereafter, and maintain the action. The court below decided this question in the negative, and dismissed the action. Its judgment is reversed on the authority of *State v. Book Co.*, 69 Kan. 1, 76 Pac. 4411, 1 L. R. A. (N. S.) 1041; *Deere v. Wyland*, 69 Kan. 255, 76 Pac. 863, and *Hamilton v. Reeves & Co.*, 69 Kan. 844, 76 Pac. 418."

We think that the purpose of the statute is fully accomplished by

an actual compliance with its requirements subsequent to the commencement of the action, and renders enforceable a contract theretofore unenforceable by reason of the failure to comply therewith. For the foregoing reasons, the plaintiff was entitled to maintain this action, and the judgment and decree of the court below is therefore affirmed.

Affirmed.

Steele, C. J., and Bailey, J., concur.

Further replying said plaintiff alleges that on or about May 23, 1902, the Court of Appeals of the State of Colorado, in the case of Farmers' & Merchants' Ins. Co. v. Nixon, 2 Colo. Appeal Reports, page 265, 30 Pac. Rep., page 42, decided the law of Colorado to be as follows:

In a suit on a fire insurance policy defense was made that a gasoline stove was used in the building insured, though prohibited by the policy. This prohibitory clause was waived by the agents writing the insurance, who knew of the use of gasoline on the premises, and subsequent agents, though aware of its use, did not cancel the policy. Held, that the insurance company was bound by the waiver and acquiescence of its agents.

Farmers' & Merchants' Ins. Co. v. Nixon, 30 Pac. 42.

Plaintiff further alleges that on or about February 3, 1908, the Supreme Court of the State of Colorado, in the case of German American Ins. Co. v. Hyman, German Alliance Ins. Co. v. Hyman, 42 Colo. Reports, 156, 94 Pac. 27, decided the law of Colorado to be as follows:

Defendants issued policies of insurance on plaintiff's building, conditioned to be void if any illuminating gas or vapor be generated in the building, or if any benzine or gasoline be allowed on the premises. It was stated in the policies that they were accepted subject to those conditions, and that no representative of the insurers had power to waive any provisions or conditions, except such as by the terms of the policies may be the subject of the agreement indorsed thereon or added thereto, and such waiver must be written on or attached thereto. Tenants of the building subsequently insured their stock of goods kept therein with one of defendants; the insurance being placed by the same agents. The agents, without plaintiff's knowledge, issued to the tenants a permit to install a device for the generation of gasoline vapor, and the same was installed without plaintiff's knowledge. The building was subsequently damaged by fire and explosion. Held, that the installation and use of the gasoline plant did not render plaintiff's policies void, as 58 the knowledge of the agents, who were general agents for defendants, that the plant had been installed based on their consent to its installation, is the knowledge of defendants, and constitutes a waiver of the condition in the policy.

Agents furnished with blank policies signed by the president and secretary of the insurance company, with authority to fill out the same, solicit insurance, receive applications and premiums, issue,

countersign, renew and cancel policies, are general agents, and may modify the contract of insurance, although it provides that no agent shall have power to waive any restrictive clauses, except where expressly authorized and in those cases to be waived by writing on or attaching the waiver to the policy.

Where a permit is issued to tenants by insurance agents to do that which is forbidden in policies issued by the same agents to the landlord, it will be presumed, in spite of the testimony to the contrary of the agent actually granting the permit, that they had in mind at the time the policies issued to the landlord.

Provisions in an insurance policy rendering it void, if specified articles are kept on the premises are for the benefit of, and may be waived, by the insurer.

Where an insurer has knowledge of a breach of condition, but continues to treat the policy as operative, it will continue in full force, whether the breach results from any direct action of the insurer.

Where an act forbidden by a landlord's insurance policy is done by his tenant, the landlord may enforce the policy if the act was done without his knowledge and consent, but with the knowledge and consent of the insurer.

59 Where an insurer in an action on the policy pleads forfeiture for violation of a restrictive clause, the insured may plead waiver or estoppel without first having the contract reformed so as to embody the waiver.

Where two insurance companies represented by the same general agents are in reality one and the same company, permission by the general agents acting for one company to a tenant to keep articles on the premises forbidden by his policy on goods in the building amounts to notice to the other company and waiver by it of a condition in a policy issued on the building to the landlord forfeiting the policy if those articles are kept on the premises.

Estoppel in pais is recognized in law as well as in equity, and is employed in insurance law as synonymous with waiver.

German American Ins. Co. v. Hyman, German Alliance Ins. Co. v. Hyman, 94 Pac. Rep. 27, 28.

Plaintiff further alleges that in case of Strauss v. Phoenix Ins. Co., 48 Pac. 822, the Court of Appeals of the State of Colorado, on or about April 26, 1897, duly decided the law of the State of Colorado to be as follows:

A report made by an insurance agent to his company is not admissible to corroborate his testimony that he had no knowledge at the time of the issuance of a policy of the existence of another policy covering the same property.

Strauss et al. v. Phoenix Ins. Co., 48 Pac. 822.

60 That in the case of Helvetia Swiss Fire Ins. Co. v. Allis Co. 53 Pac. Reporter 242, on or about April 11, 1898, the Court of Appeals of the State of Colorado decided the law of said State to be as follows:

Contracts of a foreign corporation doing business in Colorado are not invalidated, and its capacity to sue thereon is not affected, by failure to comply with Gen. St. Secs. 261, 262, requiring such a corporation to file a copy of its charter and of the law under which it was organized with the Secretary of State, and providing that a failure to do so shall render the officers and stockholders individually liable on its contracts.

Under Code, Sec. 49, providing that the complaint shall contain a statement of all the facts constituting the cause of action in ordinary and concise language, the conditions in a policy of insurance attached to a complaint cannot be consulted in determining whether a cause of action on the policy has been stated.

Where a cause of action on an insurance policy is stated, the company, relying on the breach of a condition of the policy, which is attached to the complaint, should set forth the condition and the facts constituting the breach.

Assured testified that the question of title was never mentioned between him and the insurance company. The company's agent testified that assured, when applying for a previous policy, had referred to another as part owner, and later stated that the policy should have been issued to him; that he owned the entire property, and had to pay out all the money, and was going to have 61 the whole business. Held, insufficient to show a fraudulent representation of sole ownership.

Where the evidence is not conflict, the question as to whether there was a waiver of proof of loss under a policy is for the court.

Where the insurance company's adjuster took steps looking to an adjustment of the loss, went to the scene of the fire, examined the ruins, proposed arbitration to assured to ascertain the amount of loss, and sent a man to the scene to estimate the damages, after which he told assured that everything appeared to be satisfactory, waiver of proof of loss will be presumed.

The placing of the defense to an action on a policy of insurance on the ground that the policy was not in force when the property was destroyed amounts to a waiver of proof of loss.

Helvetia Swiss Fire Ins. Co. v. Allis Co., 53 Pac. 242.

Further replying said plaintiff alleges that before the commencement of this suit said plaintiff duly performed all the conditions on its part which were required of it by the State of Colorado, to entitle it to do business and hold property in said State of Colorado, and to institute, prosecute and maintain any and all actions, and to enforce any rights it might have against any party or parties in any courts of the State of Colorado.

Further replying said plaintiff alleges that by the law and the decisions of the Supreme Court and of the Court of Appeals of the State of Colorado, the law of said State is that if the agents of 82 said defendant, who wrote, signed and delivered said policy of insurance, and received the premium therefor, from said plaintiff, knew of the existence of said mortgages or deeds of trust, and knew that said building was idle and was not in opera-

tion, when they wrote said policy, that then the defendant company waived its right to declare said policy void, and said plaintiff alleges the fact to be that the agents of said defendant, who did write, countersign and deliver said policy, and made said contract and policy of insurance of said defendant, did know and were fully informed of each and all of said facts, but that, notwithstanding the facts, they wrote, signed and delivered said policy, to said plaintiff, and received the premium therefor, and said plaintiff alleges that by reason of said facts said defendant waived its right and is estopped to claim that such policy and contract of insurance is void. Except, as is herein before admitted, plaintiff denies each and every allegation in said answer contained.

Wherefore said plaintiff prays judgment as it has heretofore prayed in its petition, and for the costs and disbursements of this suit."

Further during said March Term, 1912, on March 14, 1912, the parties to this cause filed the following stipulation of fact:

Stipulation of Fact.

"It is stipulated and agreed for the purpose of this case and also in all the cases of this same plaintiff against 13 other insurance companies now pending in this court, that the said plaintiff did 63 not prior to Jan. 10th, 1911, have a certificate from the Secretary of State of Colorado to do business in the said State of Colorado but that such certificate was thereby issued to plaintiff on said last named date, January 10, 1911, that the same may be introduced in evidence subject to the rules of competency and relevancy only.

FRY & RODGERS,
BARCLAY, FAUNTLEROY & CULLEN,
Plaintiff - Attorneys.
FRED HERRINGTON,
ROBERTSON & ROBERTSON,
For the Defendant."

Further during said March Term, 1912, on March 14 and 15, 1912, the cause was tried before the court and a jury and verdict returned for \$2,689.57. The record entry of the judgment is as follows:

Judgment.

Now on this March 14th, 1912, comes parties and file a stipulation of facts in the above cause, and by consent this case The Pennsylvania Fire Insurance Company of Philadelphia, is called for trial instead of The Fidelity Phenix Fire Insurance Company of New York, and comes now parties, plaintiff with its attorneys and defendant by and with its attorneys, and this cause being now called for trial, both parties answer ready; thereupon comes the following jury, to-wit: Joseph A. Adrain, J. T. Booley, W. G. Pike, Marion Walker,

T. F. Hess, Thomas Stowers, O. F. Ellis, M. S. McClintic, Ralph House, W. B. Langford, Wm. Prior, and A. K. Luckie, twelve good —
lawful men from the body of Audrain County, who are duly
64 sworn and impanelled to try this cause and after hearing a
portion of the evidence in above cause, the hour of adjournment
having arrived, upon order of court said jury is excused until
tomorrow morning, March 15th, 1912, at nine o'clock a. m.
* * * * *

Now on this March 15th, 1912, come again the parties with and by their attorneys as well also the jury heretofore impanelled in the above cause and after hearing all the evidence in the cause, the instructions of the court and the argument of the counsel, said jury retires to their room to consider of their verdict, after due deliberation, said jury returns into open court the following verdict:

"We, the jury, find in favor of the plaintiff and we assess the amount of its recovery at Twenty-six Hundred Eighty-nine and 57-100 Dollars (\$2,689.57).

W. S. McCLINTIC, *Foreman.*"

It is therefore considered, ordered and adjudged by the court that plaintiff have and recover of and from the defendant herein, The Pennsylvania Fire Insurance Company of Philadelphia, the sum of Twenty-six hundred, Eighty-nine and 57-100 Dollars, (\$2,689.57), together with its costs herein laid out and expended and that execution issue therefor.

Further during said March Term, 1912, on March 19, 1912, defendant filed motion for new trial also motion in arrest of judgment.

Further during said March Term, 1912, on March 20, 1912, plaintiff filed a remittitur in the sum of \$15.00 and the judgment 65 was amended to stand in the sum of \$2,674.57; defendant's motion for new trial and defendant's motion in arrest of judgment were submitted to the court and overruled.

Thereupon an appeal was duly taken by the defendant to the Supreme Court of the State of Missouri.

Thereafter the bill of exceptions was duly filed, said Bill of exceptions is as follows:

In the Circuit Court of Audrain County, Missouri, March Term, 1912.

THE GOLD ISSUE MINING & MILLING CO., Plaintiff,
vs.
THE PENNSYLVANIA FIRE INSURANCE CO. OF PHILADELPHIA,
Defendant.

Appearances: Hon. Thos. Fauntieroy, Att'y at Law, of the firm of Barclay, Fauntieroy & Cullen; Messrs. Fry & Rodgers, Att'y's at Law; Hon. Fred B. Shaw, Att'y at Law, of the Denver Bar, for the plaintiff; Hon. George Robertson, Att'y at Law, of the firm of

Robertson & Robertson; Hon. Fred Herrington, Att'y at Law, of the Denver Bar, for the defendant.

Be it remembered, that on the trial of the above entitled cause, at the March Term, 1912, of the Circuit Court of Audrain County, Missouri, held at the City of Mexico, and on the 14th and 15th days of March, 1912, before the Hon. J. D. Barnett, Judge, and a jury, the following proceedings were had, to-wit:

The plaintiff, to sustain the issues on its behalf, introduced evidence, as follows, to-wit:

66 Mr. Fauntleroy: We now offer in evidence the policy sued upon in this case, marked "Exhibit A."

Mr. Robertson: We have no objection.

Mr. Fauntleroy: I don't suppose it will be necessary to read it all, Mr. Herrington?

Mr. Herrington: Read whatever you want.

The Court: The whole paper is in evidence; you may read such parts as you desire.

The above policy Exhibit A, is in words and figures as follows, to-wit:

"No. 698. \$2,500.00.

The Pennsylvania Fire Insurance

(Virtue, Liberty, and Independence)

Company, Philadelphia,

In consideration of the Stipulations herein named and of Seventy-four and 12-100 Dollars Premium Does Insure The Gold Issue Mining and Milling Company for the term of One Year from the 5th day of October, 1909, at noon, to the 5th day of October, 1910, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Twenty-five hundred Dollars to the following described property while located and contained as described, herein, and not elsewhere, to-wit:

The Gold Issue Mining and Milling Co.

This policy being for \$2,500 covers a prorata part of each of the following items and subdivisions on property belonging to the insured, situate on their premises about 2 miles north of the City of Cripple Creek, Teller County, Colorado.

Buildings.—The term building shall be taken to include its adjoining and communicating additions and platforms, its trestles and all its permanent fixtures, but shall not cover foundations, walls, floors or other portions thereof which are made of stone, concrete or cement. Where trestle is connecting two buildings insured under separate items then the same shall be considered as one-half belonging to each building.

Ore and Gold in Process.—The term Ore and Gold in process shall be taken to include ore and all products derived therefrom by treatment or otherwise including gold therein or in whatsoever form or association with other material the same may be, except gold which has been amalgamated or melted into buttons or bars.

Machinery.—The term machinery shall be taken to include boilers, pumps, engines, tanks, machines, machinery, piping and wiring, tools, implements, zinc, cyanide, fuel, supplies, furniture, fixtures, scientific apparatus, fire extinguishing apparatus, and all other personal property incident to the business (not otherwise insured), while contained in building designated. This term shall not cover any stone, concrete or cement foundations for tanks, machinery or other items of equipment.

Electrical.—The term electrical shall be taken to include motors, dynamos, switchboards, exciters and other electrical machines.

Exemption Clause.—This insurance does not cover any loss or damage to dynamos, exciters, lamps, switches or motors, caused by electric current, whether artificial or natural. The lightning clause is not a waiver of this condition.

Watchman's Clause.—It is warranted by the insured that whenever any of the following named parts of the plant described by this policy, viz: Main Building and Edwards Roaster, is idle or not in operation, from any cause whatever, a watchman shall be employed and due diligence used to keep a continuous watch both day and night immediately about said part of plant. If any of the above named parts is idle or not in operation for a period of more than thirty (30) days, without the written consent of this Company, this policy shall be void.

Reduced Rate Average Clause.—This clause applies only to insurance under subdivision "D." "In consideration of the rate at and—or from under which this policy is written, it is expressly stipulated and made a condition of this contract that this Company shall be held liable for no greater proportion of any loss than the amount

hereby insured bears to 80 per cent of the actual cash value of 69 the property described herein at the time when such loss shall happen nor for more than the proportion which this policy bears to the total insurance thereon.

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately."

Three-fourths Value Clause.—This clause applies to all items and subdivision- except "D." It is understood and agreed to be a condition of this insurance, that, in event of loss or damage by fire to the property insured under this policy, this Company shall not be liable for an amount greater than three-fourths of the actual cash value of

each item of property covered by this policy (not exceeding the amount insured on each such item) at the time immediately preceding such loss or damage and in the event of additional insurance, if any is permitted thereon, then this Company shall be liable for its proportion only of three-fourths such cash value of each item insured at the time of fire, not exceeding the amount insured on each such item.

Total insurance is hereby permitted for, and limited to, three-fourths of the Cash value of the property herein described, and to be concurrent herewith.

Privileges.—Permission is hereby granted to operate at all hours, both day and night; to use kerosene oil and electricity for lights; to keep in any of the above designated buildings, not to exceed five gallons of gasoline in tight metal cans free from leak, and not within 25

feet of any open artificial light or fire; to keep on insured's
70 premises under ground and over 75 feet from any insured

building, not exceeding one barrel of gasoline; to use residuum oil for fuel of not less than 300 degrees Fahrenheit, flash test, for firing boilers and roadsters, to be delivered as used through a pipe from a storage tank, free from leak, situate more than 40 feet from any building; to make additions, alterations and repairs (this insurance to cover therein and thereon under appropriate subdivision;) to erect new buildings and to deplete; and for additional insurance on any one or more of the above items or subdivisions (as limited) which insurance shall contribute pro rata herewith under such items, items or subdivision specifically insured by such additional insurance.

Lightning Clause.—It is hereby specially agreed, that this policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term lightning, and not in any case to include loss or damage by wind, tornado, or cyclone,) to the property insured, not exceeding the sum insured nor the interest of the insured in the property whether fire ensues or not, and provided, that if there is other insurance upon the property damaged, then this Company shall only be liable for such proportion of the loss or damage as the sum hereby insured bears to the whole amount of insurance thereon whether such other insurance contains a similar provision or not.

71 Attached to and forming part of Policy No. 698 of the Pennsylvania Insurance Company of Philadelphia.

Office of Kilpatrick & Hanley, Cripple Creek, Colo.

Kilpatrick & Hanley, Agents.

1. This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the
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- same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if
3. they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value,
 5. and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required of its intention so to do, but there can be
 6. 72 no abandonment to this company of the property described.
 7. This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstances concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or
 10. the subject thereof, whether before or after a loss.
 11. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered
 12. 13. in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days;
 14. or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other
 15. 16. 73 than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with
 17. the knowledge of the insured, foreclosure proceeding be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any

- change, other than by the death of an insured, take place in
the in-
21. terest, title, or possession of the subject of insurance (except
charge of occupants without increase of hazard) whether by
legal
22. process or judgment or by voluntary act of the insured, or
otherwise; or if this policy be assigned before a loss; or if il-
luminating
23. gas or vapor be generated in the described building (or ad-
jacent thereto) for use therein; or if (any usage or custom of
trade or
24. manufacture to the contrary notwithstanding) there be kept,
used, or allowed on the above described premises, benzine,
benzole,
25. dynamite, ether, fireworks, gasoline, greek fire, gunpowder ex-
ceeding twenty-five pounds in quantity, naptha, nitro-
glycerine
26. or other explosives, phosphorus, or petroleum or any of its
products of greater inflammability than kerosene oil of the
United
27. 74 States standard (which last may be used for lights and
kept for sale according to law in quantities not exceed-
ing five barrels,
28. provided it be drawn and lamps filled by daylight or at a dis-
tance not less than ten feet from artificial light); or if a build-
ing
29. herein described, whether intended for occupancy by owner or
tenant, be or become vacant or unoccupied and so remain for
ten days.
31. This company shall not be liable for loss caused directly or
indirectly by invasion, insurrection, riot, civil war or commo-
tion, or military or usurped power, or by order of any civil
authority; or by theft; or by neglect of the insured to use all
rea-
33. sonable means to save and preserve the property at and after a
fire or when the property is endangered by fire in neighboring
34. premises; or (unless fire ensues, and, in that event, for the
damage by fire only) by explosion of any kind, or lightning,
but
35. liability for direct damage by lightning may be assumed by
specific agreement hereon.
36. If a building or any part thereof fall, except as the result of
fire, all insurance by this policy on such building or its con-
tents
37. shall immediately cease.
38. This company shall not be liable for loss to accounts, bills,
currency, deeds, evidences of debt, money, notes, or se-
curities;
39. 75 nor, unless liability is specifically assumed hereon, for
loss to awnings, bullion, casts, curiosities, drawings,
dies, implements,

40. jewels, manuscripts, medals, models, patterns pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture,
41. tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance
42. or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor
43. for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole
44. insurance on the building described.
45. If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.
47. In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.
49. This policy may *be* a renewal be continued under the original stipulations, in consideration of premium for the renewed
50. term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.
51. 76 This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of
52. such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been
53. actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the cus-
54. tomary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.
56. If, with the consent of this company, an interest under this policy shall exist in favor of a mortgage or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such
59. interest as shall be written upon, attached, or appended thereto.

If the property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, 60
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| 77 | for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not. | 62 63 64 65 66 |
| | If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; | 67 68 69 70 71 |
| 78 | the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuance of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary | 72 73 74 75 76 77 78 79 |

public shall certify.

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The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property

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herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and,

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79 as often as required, shall produce for examination all books of accounts, bills, invoices, and other vouchers, or certified copies

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thereof if original be lost, at such reasonable place as may be designated by this company or its representative, and shall

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permit extracts and copies thereof to be made.

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In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent

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and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent

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and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and

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damage, and, failure to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine

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the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the

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expenses of the appraisal and umpire.

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This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any

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requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss

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80 shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein

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required have been received by this company, including an award by appraisers when appraisal has been required.

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This company shall not be liable under this policy for the greater proportion of any loss on the described property, or for

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loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole

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insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application

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of the insurance under this policy or of the contribution to

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| be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon. | 100 |
| If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss be subro- gated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment. | 101 102 103 104 105 |
| 81 No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing require- ments, nor unless commenced within twelve months next after the fire. | 106 107 |
| Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equiv- alent of "loss or damage." | 108 109 |
| If this policy be made by a mutual or other company hav- ing special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regula- tions shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto. | 110 111 112 |
| This policy is made and accepted subject to the foregoing stip- ulations and conditions, together with such other provisions, agree- ments, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy ex- cept such as by the terms of this policy may be the subject of agree- ment indorsed hereon or added hereto, and as — such provisions and conditions no officer, agent, or representative shall have the power or be deemed or held to have waived such provisions or con- 82 ditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affect- ing the insurance under this policy exist or be claimed by the in- sured unless so written or attached. | 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 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985 986 987 988 989 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 990 991 992 993 994 995 996 997 998 999 1000 1001 1002 1003 1004 1005 1006 1007 1008 1009 10010 10011 10012 10013 10014 10015 10016 10017 10018 10019 10020 10021 10022 10023 10024 10025 10026 10027 10028 10029 10030 10031 10032 10033 10034 10035 10036 10037 10038 10039 10040 10041 10042 10043 10044 10045 10046 10047 10048 10049 10050 10051 10052 10053 10054 10055 10056 10057 10058 10059 10060 10061 10062 10063 10064 10065 10066 10067 10068 10069 10070 10071 10072 10073 10074 10075 10076 10077 10078 10079 10080 10081 10082 10083 10084 10085 10086 10087 10088 10089 10090 10091 10092 10093 10094 10095 10096 10097 10098 10099 100100 100101 100102 100103 100104 100105 100106 100107 100108 100109 100110 100111 100112 100113 100114 100115 100116 100117 100118 100119 100120 100121 100122 100123 100124 100125 100126 100127 100128 100129 100130 100131 100132 100133 100134 100135 100136 100137 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valid until countersigned by the duly authorized Agent of the Company at Cripple Creek, Col.

R. DALE WINDSOR, *President.*

Attest:

MR. GARDNER CROWELL, *Secretary.*

Countersigned this 5th day of October, 1909.

KILPATRICK & HANLEY, *Agent.*"

On the back of the above policy is the following indorsement: "Standard Fire Insurance Policy of the States of New York, New Jersey, Connecticut, Rhode Island and North Carolina. Expires October 5th, 1910. Property—Plant—Am't \$2500.00. Premium \$74.12. The Gold Issue M. & M. Co.—No. 698. The Pennsylvania Fire Insurance Company. Stock Company, Incorporated 1825. 508-510 Walnut Street Philadelphia. Ketterlinus, Phila. Kilpatrick & Hanley, Insurance, Real Estate, Collections, Cripple Creek, Colo.

83 It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

Form 6-50 M—8-1907."

Mr. Luckie (a member of the jury): Say, will you please read the conditions of the policy upon which it was issued.

(Mr. Fauntleroy reads from the policy.)

Mr. Herrington: You better read the watchman's clause on the rider.

(Mr. Fauntleroy reads further from the policy.)

Mr. Fauntleroy: Now, have you the proofs of loss?

Mr. Herrington: Yes, sir.

Mr. Fauntleroy: It is admitted that they received notice and proof of loss within sixty days called for by the policy.

Mr. Herrington: We make no contention as to not receiving them in time.

Mr. Fauntleroy: We offer in evidence two papers marked Exhibits 1 and 2.

Mr. Herrington: This offer is for the purpose of showing that you complied with the terms of the policy?

Mr. Fauntleroy: Yes, sir.

Mr. Herrington: And it is limited to that purpose.

Mr. Fauntleroy: I am offering them.

Mr. Herrington: I object to the introduction of the proofs of loss for any other purpose than to show that the terms of the policy were complied with, and under that understanding, that the terms 84 of the policy were complied with in relation to furnishing proof of loss, and for any other purpose, I object.

The Court: Well, if they are competent for any purpose, it is the duty of the court to admit them; if there are parts of them that are not competent at all they should be called to the attention of the

court, if counsel desires to offer the whole paper. If there is any part that's objectionable.

Mr. Robertson: We make the objection they contain some self-serving statements that—

The Court (interrupting): If those things are pointed out to the court—the exhibit may be read.

To which ruling of the court, the defendant by its counsel duly excepted and saved its exceptions.

Exhibits 1 and 2 are in words and figures as follows, to-wit:

EXHIBIT 1.

"To The Pennsylvania Fire Ins. Co. and to Messrs. J. E. Hanley and D. W. Kilpatrick, Co-partners as Hanley and Kilpatrick, Agents:

You are hereby notified that the mill buildings, contents, machinery, tools, implements, pipes, fixtures, connections goods and chattels, commonly known as The Gold Issue Cyanide Mill situate and being upon the "Faithful" lode mining claim, U. S. Survey Lot No. 11346, in the County of Teller and State of Colorado, and upon

which you did, on or about the 5th day of October, A. D. 85 issue and deliver to the undersigned your certain Insurance Policy, numbered 698 for the sum of \$2,500 Dollars

was on or about the 13th day of August, A. D. 1910, totally destroyed by a fire causing a complete loss to you under said policy and to the undersigned, The Gold Issue Mining & Milling Company, of all of its said property.

You are further notified that a complete inventory of the same and of all said property and showing the quantity and cost of each article and the amount claimed thereon, as near as we are able to make the same, is hereto attached, marked "Exhibit A," and hereby made a part hereof.

You are further notified that the said fire occurred on or about the 13th day of August, A. D. 1910 at about the hour of forty-five minutes past six o'clock in the afternoon of said day, and was caused by a flash, bolt or stroke of lightning which struck said building and caused the same to be set on fire, burned and totally destroyed, according to the best knowledge and belief of the undersigned.

That the interest of The Gold Issue Mining & Milling Company the insured, is that of an owner of said property; and there are no other owners or claimants thereof or thereto except as herein stated.

That on or about the 22nd day of October, 1909, The Gold Issue Mining & Milling Company, by J. F. W. Doepke, President, did make, execute and deliver a certain chattel mortgage upon

86 One Edward's Duplex Roasting Furnace, with building,
One Edward's Cooler and Ten H. P. Electric Motor, with
building,

One Even-Waddell Chilian Mill,

as collateral to secure the sum of Twenty Five Thousand (\$25,000.00) Dollars to Joseph Peters for monies advanced or guaranteed to said Company by said Peters. That said mortgage has been re-

leased, cancelled and assigned to The Gold Issue Mining & Milling Company, and said Company is now the owner and holder thereof. That said mortgage was, on the 10th day of June, A. D. 1910, filed for record and duly recorded in the office of the Recorder and County Clerk of Teller County, Colorado, at page 296 of Book 140, of said records. That in addition to the insurance set forth in your above described policy, the undersigned is the owner and holder of the following insurance upon said property including — and other than that of yours. The following insurance covering said property is held by The Gold Issue Mining & Milling Company, to-wit:

The National Fire Insurance Company of Hartford, Conn. Policy No. 307156, dated Oct. 5, 1909, 1 year, \$5,000.00.

The Equitable Fire & Marine Insurance Co. of Providence, R. I. Policy No. 5257, dated Oct. 5, 1909, 1 year, \$5,000.00.

The Fireman's Fund Insurance Co. of San Francisco, Calif., Policy No. A-587651, dated Oct. 5, 1900, 1 year, \$5,000.00.

87 The Royal Insurance Co., Ltd., of Liverpool Policy No. 113 dated Oct. 5, 1909, 1 year \$5,000.00.

The Niagara Fire Insurance Co. of New York, Policy No. 5775, dated Oct. 5, 1909, 1 year, \$5,000.00.

The Fire Asso. of Philadelphia, Policy No. 3879996, dated Oct. 5, 1909, 1 year, \$3,500.00.

The Queen Insurance Co. of America Policy No. 1129, dated Oct. 5, 1909, 1 year, \$5,000.00.

The Atlas Assurance Co. Ltd., of London, England, Policy No. 2121050, dated Oct. 5, 1909, 1 year, \$2,500.00.

The Royal Exchange Assurance of London England, Policy No. 2997611, dated Oct. 5, 1909, 1 year, \$2,500.00.

The Scottish Union & National Insurance Co., of Edinburgh, Policy No. 3989219, dated Oct. 5, 1909, 1 year, \$2,500.00.

The Pennsylvania Fire Insurance Co., Policy No. 698, dated Oct. 5, 1909, 1 year, \$2,500.00.

The New Hampshire Fire Insurance Co., Policy No. 2594187, dated Oct. 5, 1909, 1 year, \$2,500.00.

The Fidelity Phoenix Fire Insurance Co. of N. Y., Policy No. 2014, dated July 22, 1910, expires 1 year, \$2,500.00.

The Providence Washington Insurance Co., of Providence, R. I. Policy No. 1021, dated Oct. 5, 1909, 1 year, \$1,500.00.

THE GOLD ISSUE MINING & MILLING CO.

J. F. W. DOEPKE, Pres. & Gen'l Mgr.

88 STATE OF COLORADO,
County of Teller, ss:

J. F. W. Doeple, being first duly sworn upon his oath doth depose and say: That he is the president and general manager of The Gold Issue Mining & Milling Company; that he has read the foregoing proof of loss, notice and Exhibit A thereto attached, and knows the contents thereof, and he says that the matters and things which are therein stated are true to the best of his knowledge and belief.

J. F. W. DOEPKE.

Subscribed and sworn to before me this 9th day of September,
A. D. 1910.

[SEAL.]

HENRY TANNENBAUM,
Notary Public.

*The Articles, Quantity, and Cost Thereof Contained in the Gold
Issue Cyanide Mill at Time of Its Destruction by Fire.*

| Quantity, | Article. | Cost and amount claimed. |
|-------------|---|--------------------------|
| 2-10 (20) | Batteries 10 | |
| 2-50" x 10" | Frenier Pumps | |
| 1-28' | Distributor with trolley | |
| 1 | Gould Air Compressor 25 x 4 | |
| 1 | Smith and Vaile Solution Pump 6 x 4 x 8 | |
| 40 | Round Zinc Boxes 1 3-5 cubic ft. | |
| 2 | Large Vacuum Tanks | |
| 1 | Small Vacuum Tank | |
| | 1 Large Air Receiver | |
| 89 | 4 Large Steel Sand Tanks 28 x 5 ft. | |
| | 4 Large Steel Slime Tanks 12 x 10 ft. | |
| 2 | 2 Large Steel Sump Tanks 24 x 10 ft. | |
| 2 | 2 Large Steel Storage Tanks 26 x 10 ft. | |
| 2 | 2 Large Steel Gold Tanks 10 x 10 ft. | |
| | Above with belting, electric wiring and piping, freight hauling labor with connections and in- stallation costing | |
| 2 | 80 H. P. Boilers | \$39,800.00 |
| 1 | Smoke Stack) | 2,700.00 |
| 1 | 12 x 16 Tongyne Aut. Eng. complete | 1,500.00 |
| 1 | Dorr Classifier | 1,800.00 |
| 1 | Kelley Filter Press | 4,300.00 |
| 1 | Chilian Mill and Spares | 4,800.00 |
| 1 | Kelley Filter Press Pump | 450.00 |
| 1 | Electric Dynamo & supplies | 1,800.00 |
| 1 | Set Coarse Rolls & Elevators | 750.00 |
| | | 57,900.00 |
| 1 | Finishing Rolls & Elevators | 1,350.00 |
| 1 | Large Sampler | 300.00 |
| 1 | Large Hopper | 50.00 |
| 1 | Large Solution Pump | 690.00 |
| 1 | Large Centrifugal Pump | 760.00 |
| 2 | Water Pumps | 225.00 |
| 1 | Large Blanket Table | 95.00 |
| 1 | Amalgam Agitator & Supplies | 360.00 |
| 1 | Gold Slime Agitator | 200.00 |
| 1 | Large Acid Vat | 85.00 |
| | 1 Large Wooden Slime Agitator | 260.00 |
| 90 | 2 Large Zinc Steel Boxes | 1,450.00 |

| | |
|--------------------------------------|-------------|
| 6 Callors Slime Settling Tanks | 1,490.00 |
| 2 Large Steel Solution Tanks | 875.00 |
| 1 Large Steel Storage Tank | 360.00 |
| 1 Large Steel Settling Tank | 290.00 |
| | <hr/> |
| | \$66,740.00 |

Motors.

| | |
|----------------------------------|-----------|
| 1 75 H. P. Motor) | 1,650.00 |
| 1 15 H. P. Motor) | |
| 1 60 H. P. Motor) | 1,491.00 |
| 1 25 H. P. Motor) | |
| 2 30 H. P. Motors | 1,150.00 |
| 1 25 H. P. Motor | 650.00 |
| 1 15 H. P. Motor | 375.00 |
| 1 10 H. P. Motor | 250.00 |
| 1 7½ H. P. Motor | 175.00 |
| 1 2 H. P. Motor | 125.00 |
| Belting, etc. | 1,400.00 |
| Piping, etc. | 3,500.00 |
| Tools, Cars, Tracts, etc. | 1,200.00 |
| Hose and Connections | 225.00 |
| Electric Wiring & fixtures | 1,600.00 |
| 400 lbs. Cyanide | 980.00 |
| Gold in process | 12,000.00 |

91

Buildings.

| | |
|---|-----------|
| 1 Main building, corrugated iron roofing and conveyor building | 40,000.00 |
| 1 Branch building for Kelley Filter Press and Compressor room | |
| 1 Branch building for ore bins 600 ton capacity | |
| 1 Wood and brick building for office.....Office, assay, laboratory, refining & Smelting.... | 600.00 |

\$134,111.00

EXHIBIT 2.

To The Pennsylvania Fire Insurance Co. and to Messrs. Hanley & Kilpatrick, Agents:

We are advised that under the recitals of your policy of insurance No. 698 upon the Cyanide mill property of The Gold Issue Mining & Milling Company, situated upon the "Faithful" lode mining claim, U. S. survey lot No. 11346, situate upon the premises of the company, about two miles north of the City of Cripple Creek in Teller County, Colorado, destroyed by stroke of lightening and fire resulting therefrom, on the 13th day of August, 1910, and notice and proof of loss of which we gave you September 13th, 1910, there should also have been included in said notice and proof of loss a copy

of all the descriptions and schedules in all policies of insurance mentioned in said notice and proof of loss.

92 We desire to supplement the same by adding thereto and hereby stating that we have hereto attached a copy of all the descriptions and schedules in all policies which covered said property and was attached to, and embodied in, each and every one of said policies of all other insurance as well as your own mentioned in said notice and proof of loss, and marked "Exhibit B" and hereby made part hereof.

You are further notified that the buildings mentioned in the said notice and proof of loss, and the several parts thereof, were occupied by The Gold Issue Mining & Milling Company, as a whole, as a cyanide mill, for the purpose of treating, reducing and extracting precious minerals from ore of The Gold Issue Mining & Milling Company and its customers, and that the several buildings mentioned in our said notice and proof of loss were occupied as follows:

I.

One main building, corrugated iron roofing, and conveyor buildings thereto attached, containing engines, boilers, fittings, repairing and machine shops, one Chili mill, motors, twenty stamps, sump tanks, storage tanks, all used for the purpose of reducing metaliferous ores and the extraction therefrom of precious metals by what is known as the cyanide process, tools and implements and paraphernalia in connection therewith, and occupied by The Gold Issue Mining & Milling Company, and the said conveyor buildings were occupied by the insured for the purpose, and with machinery contained therein, or transmitting ores from the rolls and crushers of the mill to the roaster, and from the roaster and coolers to the Chili mill.

II.

One branch building for Kelley filter press and compressor room was occupied by the insured with one Kelley filter press for filtering slimes and products of the mill and a compressor with which to compress air for utilization in the agitation of the slime tanks and their contents.

III.

One branch building containing ore bins constructed for the storage of ore purchased or treated, having six hundred tons capacity.

IV.

One wood and brick building for office, assay, laboratory, refining and smelting room. Contained in the office in the frame portion thereof were the balances, weighing scales and laboratory, office fixtures, tools and implements, and the brick portion thereof was occu-

pied by the insured and contained therein the assaying, refining and smelting furnaces, tools and implements of the insured.

THE GOLD ISSUE MINING &
MILLING CO.,
By T. L. SHAW, *Its Attorney.*

EXHIBIT B.

The Gold Issue Mining & Milling Co.

This policy being for \$— covers a pro rata of each of the following items and subdivisions on property belonging to the insured, situate on their premises about 2 miles north of the City of Cripple Creek, Teller County, Colorado.

| Item. | Designation. | Class. | Roof. | Map. | Subdivision A, buildings. | Subdivision B, machinery. | Subdivision C, gold in process. | Subdivision D, electrical. | Total. |
|-------|-------------------------------------|--------|-------|------|------------------------------|------------------------------|---------------------------------------|-------------------------------|---------|
| 1 | Main Building | D-I-C | Iron | A | 20,000 | 17,500 | 9,000 | 2,100 | 48,600 |
| 2 | Edwards Roaster | I-C | Iron | B | ..... | ..... | ..... | 750 | 750 |
| 3 | Tram Motor Bldg. | I-C | Iron | C | ..... | ..... | ..... | ..... | ..... |
| 4 | Transformer | I-C | Iron | D | ..... | ..... | ..... | ..... | ..... |
| 5 | Blacksmith and Carpenter Shop | I-C | Iron | E | ..... | ..... | ..... | ..... | ..... |
| 6 | Refining and Assay Building | B | Iron | G | 100 | 300 | ..... | 150 | 550 |
| 7 | Office & Laboratory | D | Iron | H | 100 | ..... | ..... | ..... | 100 |
| | | | | | <hr/> | <hr/> | <hr/> | <hr/> | <hr/> |
| | Grand total | | | | 20,200 | 17,800 | 9,000 | 3,000 | 50,000" |

Buildings.—The term building shall be taken to include its adjoining and communicating additions and platforms, its trestles and all its permanent fixtures, but shall not cover foundations, walls, floors, or other portions thereof which are made of stone, concrete or cement. Where trestle is connecting two buildings insured under separate items then the same shall be considered as one-half belonging to each building.

Ore and Gold in Process.—The term Ore and Gold in process shall be taken to include ore and all products derived therefrom by treatment or otherwise including gold therein or in whatsoever form or association with other material the same may be, except gold which has been amalgamated or melted into buttons or bars.

Machinery.—The term machinery shall be taken to include boilers, pumps, engines, tanks, machines, piping and wiring, tools, implements, zinc, cyanide, fuel, supplies, furniture, fixtures, scientific apparatus, fire extinguishing apparatus, and all other personal property incident to the business (not otherwise insured), while contained in building designated. This term shall not cover any stone, concrete or cement foundations for tanks, machinery or other items of equipment.

Electrical.—The term electrical shall be taken to include motors, dynamos, switchboards, excitors and other electrical machines.

Exemption Clause.—This insurance does not cover any loss or damage to dynamos, excitors, lamps, switches or motors, caused by electric current, whether artificial or natural. The lightening clause is not a waiver of this condition.

Watchman's Clause.—It is warranted by the insured that whenever any of the following named parts of the plant described by this policy, viz.: Main Building and Edwards Roaster, is idle or not in operation, from any cause whatever, a watchman shall be employed and due diligence used to keep a continuous watch both day and night immediately about said part of the plant. If any of the above named parts is idle or not in operation for a period of more than thirty (30) days, without the written consent of this Company, this policy shall be void.

Reduced Rate Average Clause.—This clause applies only to insurance under subdivision "D." "In consideration of the rate at and—or form under which this policy is written, it is expressly stipulated and made a condition of this contract that this Company shall be held liable for no greater proportion of any loss than the amount hereby insured bears to 80 per cent. of the actual cash value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon."

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately."

Three-fourths Value Clause.—This clause applies to all items and subdivisions except "D." It is understood and agreed to be a condition of this insurance, that, in event of loss or damage by fire to the property insured under this policy, this Company shall not be liable for an amount greater than three-fourths of the actual cash

value of each item of property covered by this policy (not exceeding the amount insured on each such item) at the time immediately preceding such loss or damage; and in the event of additional insurance, if any is permitted thereon, then this Company shall be liable for its proportion only of three-fourths such cash value of each item insured at the time of fire, not exceeding the amount insured on each such item.

Total insurance is hereby permitted for, and limited to, three-fourths of the Cash value of the property herein described, and to be concurrent herewith.

Privileges.—Permission is hereby granted to operate at all hours, both day and night; to use kerosene oil and electricity for lights; to keep in any of the above designated buildings, not to exceed five gallons of gasoline in tight metal cans free from leak, and not within

25 feet of any open artificial light or fire; to keep on insured's premises under ground and over 75 feet from any insured building, not exceeding one barrel of gasoline; to use residuum oil for fuel of not less than 300 degrees Fahrenheit, flash test, for firing boilers and roasters, to be delivered as used through a pipe from a storage tank, free from leak, situate more than 40 feet from any building; to make additions, alterations and repairs (this insurance to cover therein and thereon under appropriate subdivision); to erect new buildings and to deplete; and for additional insurance on any one or more of the above items or subdivisions (as limited above) which insurance shall contribute pro rata herewith under such item, or items or subdivision specifically insured by such additional insurance.

Lightening Clause.—It is hereby specially agreed, that this policy shall cover any direct loss or damage by lightening (meaning thereby the commonly accepted use of the term lightening, and not in any case to include loss or damage by wind, tornado, or cyclone), to the property insured, not exceeding the sum insured nor the interest of the insured in the property whether fire ensues or not; and provided, that if there is other insurance upon the property damaged, then this Company shall only be liable for such proportion of the loss or damage as the sum hereby insured bears to the whole amount of insurance thereon whether such other insurance contains a similar provision or not.

Attached to and forming part of Policy No. 698 of the Pennsylvania Fire Insurance Company of — and all other policies covering said property.

Office of Kilpatrick & Hanley, Cripple Creek, Colo.

98 STATE OF COLORADO,

County of Teller, ss:

— — — — —, *Agents.*

Fred L. Shaw, being first duly sworn, upon his oath depose- and say: That he is the duly authorized agent and attorney of The Gold Issue Mining & Milling Company, and that he has read the foregoing, statement, notice and Exhibit B thereto attached and knows

the contents thereof, and he says that the matters and things which are herein stated are true to the best of his knowledge and belief.

T. L. SHAW.

Subscribed and sworn to before me this 8th day of October, A. D. 1910.

[SEAL.]

HENRY TANNENBAUM,
Notary Public.

My commission expires Nov. 10, 1913.

J. F. W. DEPKE being duly sworn, testified as follows, to-wit:

Direct examination by Mr. Fauntleroy:

Q. What is your name?

A. John F. W. Depke.

Q. How old are you?

A. Fifty-two.

Q. Man of family?

A. Yes, sir.

Q. Where did you live, the last twenty or thirty years?

A. St. Louis, Mo.

Q. Is that your home, now?

A. Yes, sir.

Q. And what business have you been engaged in?

A. The last six or seven years, mining and milling.

Q. You are at present the plaintiff's employee?

A. Yes, sir.

Q. Manager?

A. Yes, sir.

99 Q. And have been for how long?

A. Since the organization of the Gold Issue Mining and Milling Company.

Q. That's a corporation organized under the laws of Arizona?

A. Yes, sir.

Q. Now, state to the jury who built this mill that was destroyed by fire?

A. It was built under my management.

Q. For whom?

A. The Gold Issue Mining & Milling Company.

Q. Where was it located?

A. Cripple Creek, Colorado.

Q. When was it built?

A. If you will permit me, the Wishbone Mine——

Q. Just answer the question?

A. Built in Cripple Creek.

Q. When?

A. 1908.

Q. And when did the Gold Issue Mining & Milling Company acquire it?

A. April 23rd, 1908.

Q. And they have continued to be the owner of it ever since?

A. Yes, sir.

Mr. Robertson: Object to that statement, the question for the purpose of showing title, for the reason that the title of real estate should be shown by the record.

The Court: I gather this is more to show possession than title.

Mr. Robertson: If it is for the purpose of showing title it ought to be proved in the proper way.

100 Mr. Fauntleroy: I take it, that the burden of showing they didn't have title are on the defendant; the authorities are all to the effect where a company issues a policy it is *prima facie* proof of ownership.

The Court: I don't think that is for the Court to pass on now, but I think the question asked is a competent one.

To which ruling of the Court the defendant then and there by its counsel duly excepted and saved its exceptions.

Q. Now, how far is this property from Cripple Creek, Colorado?

A. Two miles.

Q. I wish you would describe what the property consisted of covered by this insurance?

A. You refer to the mill?

Q. I refer to all the property covered by the insurance?

Mr. Herrington: Take this rider, if you don't object.

Mr. Fauntleroy: There is no objection at all.

A. It consisted of the main building, Edwards Roaster, tram motor building, transformer, blacksmith and carpenter shop, refining and assay building, and office and laboratory.

Q. Anything there about gold in process?

A. Yes, sir.

Q. Well, I want a complete list, Mr. Herrington and I do, of the property covered by that insurance?

A. If you would kindly put the question again so I may understand what you mean.

(The question is read by the stenographer.)

101 A. The roaster, cooler, setting mill, fifteen steel tanks; two large sized zinc boxes; fourteen motors—

Q. What I wanted was a general description of the property from the policy?

A. General description?

Q. Yes, sir.

A. Well, now, description; I don't quite understand; it is designated here. I am giving the description now.

Q. All right. Go ahead.

A. Large crusher; coarse grinder; fine grinder; sampler; fifteen large ore bins; two sixty horsepower boilers; five pumps; two large compressors; amalgam machine. That's about—The assay department is the necessary assay equipment.

Q. It is the list of property mentioned in this proof of loss?

A. Yes, sir.

Q. Now, what about the ore in process?

A. Well that is the crude ore, and the ore that has been intro-

duced by crushing, roasting and then recovered by cyanide which is an asset.

Q. You mean the cyanide process?

A. Yes, sir.

Q. At that time that this insurance was taken out, who took out the insurance and applied for it?

A. The Gold Issue Mining & Milling Company.

Q. What individual?

A. Myself as president.

Q. To whom did you apply for it?

A. Mr. Kilpatrick of Kilpatrick & Hanley.

Q. Were they the agents of the defendant company mentioned in the proof of loss?

A. Yes, sir.

Q. Where were they located?

A. Cripple Creek, Colorado.

102 Q. They had an insurance agency there?

A. Yes, sir.

Q. Was the mill also covered by the policy?

A. Yes, sir.

Q. And machinery and everything in it?

A. Yes, sir.

Q. Was that located in the place called for in the policy?

A. Yes, sir.

Q. State what was the actual cash value of that property, when you asked for insurance?

A. Approximately one hundred and thirty-four thousand; one hundred and thirty-four thousand dollars, is the minimum.

Q. Did you put that much actual cash money in it?

A. Yes, sir.

Q. And you had a plant there?

A. Yes, sir.

Q. Well, now, is the present—I see that Kilpatrick and Hanley are the agents who have countersigned this policy?

A. Yes, sir.

Q. Is that their signature to your policy?

A. Yes, sir.

Q. That's the policy that has been introduced in evidence, and tell whether or not they wrote and delivered this policy together with the other policies mentioned in the proof of loss to you?

A. Yes, sir.

Q. They countersigned them?

A. Yes, sir.

Q. What is the premium you paid them?

A. I paid five hundred dollars on the amount of the total premium about sixty days after the policies were delivered.

Q. Were the policies delivered at the time they are dated, 5th of October, 1909?

A. Yes, sir.

103 Q. Did they give you time in which to pay it?

A. Yes, sir.

Mr. Robertson: Object to that as a conclusion.

Q. What if anything was said by them that you could have time to pay it?

A. I said I wanted ninety days.

Q. What did they say?

A. I was welcome to it.

Q. You paid them five hundred dollars of it at one time within sixty days afterwards, and when did you pay the balance of this premium?

A. About the 15th of August, two days after the fire.

Q. Did you receive any message from them two days after the fire?

A. Mr. Show has the paper, I believe.

Q. Have you got the telegram in your pocket?

A. No, sir. Here it is.

Q. What was the date of the fire?

A. August 13th.

Q. Were—you were not there when it burned?

A. No, sir.

Q. So you don't know except by hearsay what caused the fire?

A. Yes, sir.

Q. I show you a telegram dated August 15th, 1910, dated Cripple Creek, and ask you what that is?

A. It is a telegram from Kilpatrick and Hanley to me.

Q. Did you receive it?

A. Yes, sir.

Q. I will have the stenographer mark this Exhibit 3.

(Stenographer marks paper Exhibit 3.)

104 Q. You were in St. Louis at that time?

A. Yes, sir.

Q. And they sent the telegram from Cripple Creek to you at St. Louis?

A. Yes, sir.

Mr. Fauntleroy: I offer in evidence this telegram, Your Honor.

Mr. Herrington: We make the objection that this is incompetent to bind the defendant company because it was received after the obligation and liability, any policy that accrued, and no acts of the agents of the defendant company,—they were simply local agents,—can't bind the company by the payment of the balance of the premium.

The Court: On what theory do you consider that competent?

Mr. Fauntleroy: Because the company accepted the premium after the fire, and accepting it after the fire, why, it went into their hands; it was a waiver of anything that preceded. These are not local agents; they are general agents; they have the policies, they countersign them and collect premiums. They make a tender when this suit is brought to tender back the premiums which is the very money that they received, showing it had gone into the hands of the company. I will follow it up with evidence to show the money was paid.

The Court: Isn't that the only evidence that was material?

Mr. Fauntleroy: I think not. Suppose the agent had said to you, "we want the premium for which we gave credit," and they 105 will say "very well"; they will say "mail draft for your protection." That can only refer to the policy. It is a demand by the company on them for eleven hundred and twenty-four dollars.

The Court: The objection to that exhibit will be sustained.

Mr. Fauntleroy: Note exceptions.

Q. State when and to whom did you pay the balance of this premium of these policies? How much was the whole premium for all these policies?

A. Sixteen hundred and sixty odd dollars: whatever the telegram states.

Q. When did you pay the balance? You paid five hundred dollars, you say, within sixty days after delivery of the policy?

A. Yes, sir.

Q. When did you pay the balance?

A. August 15th, 1910.

Q. To whom?

A. Kilpatrick and Hanley.

Q. That was how many days after the fire?

A. Two days.

Q. Now, state what, if any, conversation you had with Kilpatrick and Hanley, or either of them, with reference to this insurance at the time you got the policies, or subsequent to the time you got the policies, and before the fire?

A. Well—

Mr. Robertson: That's too general.

Q. With reference to the mill being idle or anything?

The Court: You probably better take up this conversation separately.

Q. State what if any conversation you had with Kilpatrick 106 and Hanley at the time, or prior to the time, of taking out this policy with reference to the probability or this question of the plant of becoming idle or not being in operation?

Mr. Robertson: We object for the reason that the terms of the policy itself, the rider, covers that question entirely, and anything said between him and the agent would amount to nothing.

The Court: Have you any authority tending to show that the law of Colorado is different in that respect from that of Missouri?

Mr. Herrington: The law is in each state that all conversations at the time or preceding the written contract are merged into the contract. This called for something at the time he took out insurance, of some understanding he did have contrary to the provisions of the policy. If it isn't contrary, the policy speaks for itself.

The Court: At this time I will overrule the objection.

To which ruling of the Court the defendant then and there by its counsel duly excepted and saved its exceptions.

Mr. Robertson: That's limited to the time of taking the policy.

Mr. Fauntleroy: Or immediately prior.

Mr. Robertson: The objection is that all prior talk or conversation is merged into the policy, and anything else at the time of the policy would be in contradiction of it, the policy, and therefore the policy alone must speak on the subject.

107 The Court: The objection — overruled.

To which ruling of the Court the defendant then and there by its counsel duly excepted and saved its exceptions.

A. On or about January 15, 1910, I called —

Mr. Robertson (interrupting): If the Court please, we object; that's not responsive.

Q. I am asking did you have any conversation with either one of these gentlemen at the time you took out the policy, or immediately prior thereto, or in contemplation of taking it out with reference to the mill becoming idle?

A. Yes, sir.

Q. State what that was?

A. Mr. Kilpatrick made application for the insurance of our company about August 16th, in the month of August, 1910.

Q. Well, now the policies are dated 5th of October, 1909?

A. Yes, sir; I mean to say August, 1909; that's what it should be, 1909.

Q. Go on?

A. I told him that I was willing to let him have all the business of the Gold Issue Mining & Milling Company, and that he could issue the policies in October; I told him, however, that inasmuch as our mill had just commenced milling operations that I wanted, or rather the company did, would like to have the benefit of time in paying the premium. He asked me how much time. I told him fully ninety days.

Q. Well, now, we have been over that. I am asking you with reference to the property being idle. What was said, if anything, between you all with reference to the mill being shut down or being idle?

108 A. I told him that I wanted —, wanted no misunderstanding in regard to the vacancy clause; that it is possible that mills are obliged to shut down operations for many reasons: Scarcity of coal, and scarcity of ore.

Q. What did he say, if anything, in reply to that?

A. He said "all right; that would be satisfactory."

Q. That would be satisfactory?

A. Yes, sir.

Q. Now, you got the policy on October 5th?

A. 1909.

Q. Was your mill running then?

A. Yes, sir.

Q. How long did it continue to run?

A. Until January, 1910.

Q. 1910?

A. Yes, sir.

Q. Then you shut down?

A. Yes, sir.

Q. For what reason?

A. I called on Mr. Kilpatrick—

Q. For what reason did you shut down?

A. Scarcity of coal.

Mr. Robertson: If the Court please, we object to that.

The Court: Objection overruled.

To which ruling of the Court the defendant then and there by its counsel duly excepted and saved its exceptions.

Q. What did you do before you shut down, if anything? What—with Mr. Kilpatrick and Hanley—what conversation, if any, did you do immediately before shutting down, about seeing Mr. Kilpatrick and Mr. Hanley?

A. I had a conversation—

109 Mr. Robertson: We object to that for the reason that the contract is in writing and it provides itself how the contract in that regard may be changed so as to give them permission to shut down or to remain open, when it is idle and inoperative, and that the only way that could be done would be by following the terms of the policy. Furthermore, if it is offered for the purpose of changing the terms of the policy, why, then, it is not supported by any consideration.

The Court: Objection overruled.

To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

Q. State what if any conversation you had with them about shutting down the mill and being idle?

A. On January 10th I called at the office of Kilpatrick and Hanley and told Mr. Kilpatrick that we would be compelled to shut down our mill by reason of the fact that we had received notice from the coal company in Cripple Creek notifying us that on account of the scarcity of coal in the Cripple Creek district that they would be compelled to shut down our supply of coal; that in order to avoid a repetition of this coal matter our company would build a service tram to connect with their aerial tram thus connecting with their railroad switch at the Midget Mine, and thus get their coal direct from the coal mines instead of depending on the coal concern in Cripple Creek. I further told him that I did not know how long it would take to build this service tram, and for said reason I called

110 to let him know the exact conditions, as I wanted to know what to do about the insurance, especially as the mill would be idle for some time.

Q. What reply did he make to you?

A. He said, "all right; go ahead."

Q. Well, now, did you go ahead and shut down the mill?

A. If you will permit I will continue.

Q. Well, go on?

A. During the months of April—

Q. What year?

A. 1910, I further told Mr. Kilpatrick that the Midget Mine, which company furnished our company with the ore, with the milling ore, were going to make some improvements in order to facilitate the handling and shipping of ore to our mills.

Q. That's the insured mill?

A. Insured mill, yes, sir; he said "Mr. Depke, I know the conditions; I know everything is all right; go ahead; I hope that you will soon be able to commence milling operations."

Q. How long did the plant remain idle, shut down, after this?

A. Until the month of August.

Q. When it was burned?

A. Yes, sir.

Q. Well, now, state how frequently you were in Kilpatrick and Hanley's office and talked to them and told them about the mill being idle?

A. I called on Mr. Kilpatrick as much as once every month, and at times twice a month.

111 Q. What was your purpose in calling on them and what passed between you?

A. Simply to let him know we hadn't finished the operations and we couldn't commence milling operations.

Q. That you was still idle?

A. Yes, sir.

Q. Did they ever make any objections to it?

A. None whatever.

Mr. Robertson: We object to that as a conclusion.

Q. State what if anything they said in reply when you would make these visits to them?

A. Mr. Kilpatrick, knowing the conditions—Mr. Kilpatrick said he knew the conditions and that he knew everything was all right and to hurry it along and get started.

Q. Did he ever say to you or tell you it was necessary for you to have any consent endorsed in writing on the policy?

Mr. Robertson: We object to that.

The Court: He may answer.

To which ruling of the court the defendants then and there by its counsel duly excepted and saved its exceptions.

Mr. Robertson: We knew that.

Mr. Fauntleroy: Knew what?

Q. Mr. Depke, what was the value of the insured property at the time of the fire, the actual cash value of it?

Q. I stated one hundred and thirty-four thousand dollars, and that doesn't include the roaster—a hundred *hundred* and seventy to a hundred and eight thousand dollars, the value of the entire plant.

112 Q. Did you see it after the fire?

A. Yes, sir.

Q. What was the loss or damage to this insured property after the fire by the fire?

A. Total loss, with the exception of the assay and office building (that was five hundred dollars.)

Q. The whole value of the property was wiped out by that fire, with the exception of five hundred dollars, and that fire occurred?

A. August 13th, 1910.

Q. There is something said in your proof of loss and in the answer about this mortgage to Peters of twenty-five thousand dollars. State when that was paid?

A. July 10th.

Mr. Robertson: Hold on. Prove that it was paid.

Q. Was it paid?

A. Yes, sir.

Q. Who paid it?

A. The company.

Q. When?

A. July 10th, 1910.

Q. To who?

A. The Gold Issue Mining and Milling Co.

Q. The mortgage was paid to them?

A. Yes, sir, the mortgage was paid.

Q. I thought they gave the mortgage to Peters?

A. Mr. Peters was paid by the Gold Issue Mining and Milling Company. That's what I meant to say. It was misunderstood.

113 Q. When was it that was paid Peters?

A. July 10th, 1910.

Q. Have you got a satisfaction of it?

A. Yes, sir.

Q. Is this the chattel mortgage?

Mr. Herrington: Mark it as an exhibit.

Q. I will show it to you.

A. Yes, sir.

(Stenographer marks paper Exhibit 4).

Q. I show you now release of chattel mortgage and ask you what that is?

A. That's a release of the chattel mortgage for twenty-five thousand dollars.

Q. The same mortgage?

A. Yes, sir.

Mr. Fauntleroy: Mark this paper Exhibit 5.

(Stenographer marks the paper Exhibit 5).

Q. Did you pay that yourself?

A. Yes, sir.

Q. Do you know Mr. Peters' handwriting?

A. Yes, sir.

Q. You know that that release is a release to the company?
A. Yes, sir.

Mr. Robertson: Well, don't go so fast.

The Court: Do I understand you have offered Exhibits 4 and 5 in evidence?

Mr. Fauntleroy: Yes, sir.

The Court: No objection to the exhibits?

Mr. Herrington: None.

114 The Court: They may be read.

Exhibits 4 and 5 are in words and figures as follows, to-wit:

EXHIBIT 4.

"Chattel Mortgage, With Power of Sale.

Know all men by these presents, that we the undersigned Gold Issue Mining Company, by its President and Secretary, of the City of St. Louis, State of Missouri, in consideration of the sum of Twenty-five Thousand Dollars, in personal advances, and in loans guaranteed by Joseph Peters to them paid by the said Joseph Peters of the City of Florissant, State of Missouri, do Sell Assign, Transfer and Set Over unto the said Joseph Peters his Executors, Administrators and Assigns the following milling machinery located at the cyanide mill of the Gold Issue Mining and Milling Company, at Cripple Creek, Colorado: One (1) Edwards Duplex Roasting Furnace, with building; one (1) Edwards Cooler and ten horse power electric motor, with building; one Evans-Waddell Chilian Mill.

Upon Condition, that if we pay to the said Joseph Peters or his Executors, Administrators and Assigns the sum of Twenty-five thousand dollars, which the said Joseph Peters has personally advanced, or obtained by guaranteed loans for the sole use and benefit of the Gold Issue Mining and Milling Co. then this conveyance shall be void; otherwise to remain in full force and effect. And in case default be made in the payment of the debt above mentioned, or any part thereof, or of the interest due thereon, on any
115 day where the same ought to be paid, then the whole sum shall, at the election of the said Joseph Peters become immediately due and payable.

The property hereby sold and conveyed to remain in our possession until default be made in payment of the said debt and interest, or some part thereof; but in case of sale or disposal, or attempt to sell or dispose of said property, or removal or attempt to remove the same from the location herein stated or any unreasonable depreciation in value thereof, the said Joseph Peters or his legal representative may take the said property, or any part thereof, into possession. Upon taking possession of said property, or any part thereof, either in case of default or as above provided, the said Joseph Peters or his legal representative may proceed to sell the same or any part thereof at public auction to the highest bidder for cash at the

mill site in the City of Cripple Creek of Teller County, Colorado, first having given 30 days' public notice of the time, terms and place of sale, and property to be sold, by publication in some newspaper printed and published in Cripple Creek, Colo. and after satisfying the necessary costs, charges and expenses incurred by Joseph Peters and paying said debt and interest out of the proceeds of such sale he shall pay over the surplus, if any, to the Gold Issue Mining and Milling Company or their legal representatives.

116 In witness whereof, we have hereunto set our hands and corporate seal this 22nd day of October A. D., 1909.

THE GOLD ISSUE MINING & MILLING CO.

J. F. W. DOEPKE, *President.* [SEAL.]

[Corporation seal The Gold Issue Mining & Milling Co.]
EDWARD CORNET, *Secretary.*

Signed, Sealed and delivered in the presence of us:

_____.
_____.
_____.

Attested.

STATE OF MISSOURI,

City of St. Louis, ss:

J. F. W. Doeple and Edward Cornet respectively President and Secretary of The Gold Issue Mining and Milling Company of Cripple Creek, Colorado, being duly sworn on their oath say that said Company are the legal and absolute owners of the personal property above described, and that the same is free from all claims and liens whatsoever.

[SEAL.]

J. F. W. DOEPKE.
EDWARD CORNET.

Subscribed and sworn to before me this 30th day of October, 1909.

WILLIAM F. KLANKE,
Notary Public.

STATE OF MISSOURI,

City of St. Louis, ss:

On this 30th day of October, 1909, before me personally appeared J. F. W. Doeple and Edward Cornet respectively President and Secretary of The Gold Issue Mining & Milling Co., to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed of The Gold Issue Mining and Milling Company.

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in St. Louis, Missouri, the day and year first above written.

My term as Notary Public expires November 11, 1911.

[SEAL.]

WILLIAM F. KLANKE,
Notary Public."

The mortgage, Ex. 4, bears the following written endorsement on the back thereof:

"For value received I hereby transfer and assign this chattel mortgage to The Gold Issue Mining and Milling Company without recourse. Joseph L. Peters."

The mortgage, Ex. 4, bears the further marking on the back thereof:

"Chattel Mortgage with power of sale from Gold Issue M. and M. Co. to Joseph Peters, Florissant, Mo. Filed for Record this 10 day of June, A. D., 1910, at 9.29 o'clock A. M., M. J. Walsh, Recorder, by Gus Guirand, Deputy. Recorded in Book 140, Page 276."

EXHIBIT 5.

"Release of Chattel Mortgage."

In consideration of the payment of the debt named therein, I release the mortgage made by The Gold Issue Mining and Milling Company, to me, on the 22nd day of October, 1909, to secure the payment of Twenty-five thousand dollars (\$25,000.00) ¹¹⁸ Dollars, payable according to terms of contract, and on file in the office of the County Clerk and Recorder in Teller County, State of Colorado, in Book 140, Page 296, of records of said County. Witness my hand, this 1st day of September, 1910.

JOSEPH PETERS.

STATE OF MISSOURI,
St. Louis County, as:

On this 8th day of October, 1910, before me, James W. Settle, a Notary Public, duly commissioned and qualified for, and residing in said County, personally came Joseph Peters to me known to be the person whose name is subscribed to the above release as maker, and acknowledged the said instrument to be his voluntary act and deed.

Given under my hand and Notarial Seal, this 8th day of October, 1910.

[SEAL.]

JAMES W. SETTLE,
Notary Public, St. Louis Co., Mo.

My commission expires March 1st, 1911."

The paper, Exhibit 5, bears the following marking on the back thereof:

"Release of Chattel Mortgage. The Gold Issue M. & M. Co. to Joseph Peters."

Mr. Fauntleroy: Just consider them read.

Mr. Robertson: I would like for you to read the date of the execution of both of them.

119 Mr. Harrington: You don't find the date on the release do you?

Mr. Fauntleroy: No; it is dated the first day of September, 1910.

Mr. Harrington: Acknowledged October 8th, 1910.

Mr. Fauntleroy: This mortgage is recorded in Book 140, page 296, and this release is page 140—page 296; Book 140, page 296; Book 140, page 296, Records of Teller County, State of Colorado.

Mr. Robertson: That release hasn't been recorded, has it?

Mr. Fauntleroy: I don't know.

Mr. Robertson: Any mark on it to show.

Mr. Fauntleroy: No.

Mr. Harrington: You know it hasn't, then.

Mr. Fauntleroy: Well, I suppose it has not; I am showing the fact of the payment; I am not offering it to show that the satisfaction was recorded.

(By a member of the jury:) What's the date of that release?

Mr. Harrington: September 1st, 1910.

Q. Now, you say you paid that?

A. Yes, sir.

Q. And I suppose the note was surrendered up and cancelled?

A. Yes, sir.

Q. And that release given you?

A. Yes, sir.

Q. Did you ever record it?

A. No, sir.

120 Q. Why not?

Mr. Harrington: Oh, I object to that.

The Court: It seems immaterial.

Mr. Fauntleroy: I think it is immaterial, Your Honor.

Q. State whether or not Kilpatrick and Henry knew of that mortgage at any time before the date of the fire?

Mr. Herrington: Object to that as conclusion.

The Court: Objection sustained.

Mr. Fauntleroy: Suppose he told him about it.

The Court: You can ask that.

Mr. Fauntleroy: Your Honor rules that I can't ask whether they knew about it?

The Court: No, sir; that's a mere conclusion, if there was anything said.

Q. Did you ever receive any letter from Mr. Kilpatrick and Hanley with reference to this mortgage?

A. Yes, sir.

Q. Under what date?

A. July 11th and 21st.

Q. July 11th what year?

A. 1910.

Q. 1910?

A. Yes, sir.

Q. Are these the letters?

A. Yes, sir.

Q. The first letter is marked Exhibit 6, of July 11th, and the

second Exhibit 7. You recorded this chattel mortgage, didn't you, under date of June 10th, 1910?

121 A. Mr. Peters had it recorded at that time.

Q. July 10th?

A. June 10th, 1910.

Mr. Fauntleroy: Now, we offer these two letters in evidence.

Mr. Herrington: What are they marked? Exhibit 6 and 7?

The Court: Yes.

Mr. Herrington: No objection. Read it into the record.

Mr. Fauntleroy: I will read Exhibit 6, "Phoenix Insurance Company of Brooklyn" (that's the title of the paper):

"Brooklyn, New York, Western and Southern Department. Kilpatrick and Hanley, Agents, Cripple Creek, Colorado. July 11th, 1910. Gold Issue Mining and Milling Company, St. Louis, Missouri. Gentlemen: You will please forward to us at once Northern policy No. 1107093 for cancellation. This is ordered done by the company owing to the fact that mortgage has been placed on record against your company. Kindly send policy by return mail, and we will write it in another company and send policy to you. Kindly inform us when you expect Mr. Depke back from New York. Please do not delay this matter as we must send the cancelled policy to the company at once as per their request. Yours truly, Kilpatrick and Hanley." The other letter is "July 21st, 1910, Kilpatrick and Hanley, Agents, Cripple Creek, Colorado. J. F. W. Depke, St. Louis,

122 Missouri. Yours with policy enclosed was duly received today for which we thank you. Cancellation of this policy was occasioned by the filing of that chattel mortgage by Mr. Peters, and the rest of the companies may follow suit as when one starts then they generally all do. Now, regarding the payment of premiums on these policies, it seems to us that it is up to Mr. Peters to pay this premium if he wants the protection and since he is the mortgagor it is nothing more than right for him to send this premium to us, we do not feel that we want to protect his interests and hold the sack at the same time, he is in a position to advance this money and we have done our duty by the company in carrying it as long as we have even going so strong as to borrow the money from the bank here to pay the premiums to the companies. We want you to take this matter up with Mr. Peters upon receipt of this letter and advise us by return mail what he will do, after which we will decide on our line of action, unfortunately for us we are not in a position to carry an account as large as this one without embarrassing us. We will look for a reply by return mail. Yours truly, Kilpatrick and Hanley, Agents."

Q. Now, what policy was this he asked you to return and mentioned the Northern policy 1107093?

A. That's the policy I returned.

Q. Was that cancelled?

A. Yes, sir.

Q. What policy was given you in its place?

A. Fidelity-Phoenix, July 22nd, 1910, twenty-five hundred dollars.

123 Q. That's one of the policies sued on in this court?

A. Yes, sir.

Mr. Herrington: You want those introduced?

Mr. Fauntleroy: They are introduced and read in evidence.

Q. Did you ever have any talk with Kilpatrick and Hanley about this Peters mortgage?

A. During the month of June I had a short talk with him; June, 1910.

Q. What was that conversation?

A. It was a brief conversation, simply calling my attention to the mortgage having been filed of record; that it would have a bad effect with the companies.

Q. And where was this conversation had?

A. At his office.

Q. What did they say, if anything, about cancelling policies or the policy being void?

A. Nothing whatever.

Q. Did you ever receive any notice from them or anybody that they objected to that mortgage?

A. No, sir.

(By Mr. Robertson:)

Q. What was the date of that conversation.

A. It was during June; I can't just say, because I was there some times on tenth, fifth and twentieth. It was the month of June.

Q. Did they or anybody at any time prior to this fire offer to return any premiums to you?

A. No, sir.

Q. Or ever give you any intimation—

124 Mr. Herrington: If the court please, we object to that.

The Court: Objection sustained.

Q. State what, if anything, was ever said by either one of those gentlemen, or anybody representing the company, objecting to this policy by reason of this mortgage?

Objection by Mr. Herrington.

Q. Well, I will take these agents, Kilpatrick and Hanley: Did they say anything?

Mr. Herrington: Under our general objection.

A. Not a word.

Q. Have you got the deed by which the Gold Issue Mining and Milling Company got this property?

A. Yes, sir.

Q. I will have the stenographer mark this Exhibit 8.

(Stenographer marks paper Exhibit 8.)

Mr. Fauntleroy: We now offer in evidence this deed, Exhibit 8.

Mr. Robertson: Is it the original deed?

Mr. Fauntleroy: Yea, sir.

Mr. Herrington: I suppose you ought to identify it as being the property upon which—

Mr. Fauntleroy: Oh, yes.

Mr. Herrington: With the general exception that they couldn't acquire any title to lands in Colorado, I think the deed is material.

Mr. Fauntleroy: You mean because they haven't license to do business?

125 Mr. Herrington: Yes, sir, because they haven't authority to take title of any kind.

The Court: Objection overruled.

To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

Mr. Fauntleroy: Mr. Herrington asked me to identify this deed. He asked me to identify this as the deed of the property upon which the insured property stood.

Mr. Herrington: Yes, sir, on the Faithful lode.

Witness: Yes, sir, Faithful lode.

Q. On the Faithful policy—not on the Faithful policy?

A. It is called the Faithful Mining Lode.

Q. All this insured property, Mr. Herrington wants to know whether it was located on the real estate mentioned in this deed?

A. Yes, sir.

Mr. Fauntleroy: You will waive the formal reading of it and have it considered in evidence?

The Court: It will be considered in evidence.

Mr. Fauntleroy: The 4th of May, 1909, is the date of the deed. The above deed, Exhibit 8, is in words and figures as follows, to-wit:

EXHIBIT 8.

This Indenture, Made this Fourth day of May in the year of our Lord one thousand nine hundred and nine, between Mollie 126 E. O'Bryan, the Public Trustee in the County of Teller and State of Colorado, party of the first part, and The Gold Issue Mining and Milling Company of the City of St. Louis and State of Missouri, party of the second part;

Witnesseth, That whereas, The Wishbone Gold Mining Company of the County of Teller and State of Colorado, did, by its certain trust deed, dated the 3rd day of September, A. D. 1907, when said deed was recorded in the office of the County Clerk and Recorder of the County of Teller in the State of Colorado, on the 10th day of September, A. D. 1907, in book 105 on page 400 convey to George E. Kyner the then acting Public Trustee in the County of Teller in the State of Colorado, all the premises hereinafter described, to secure the payment of three (3) certain promissory notes in said deed particularly mentioned, and upon certain conditions in said deed particularly declared.

And whereas, default having been made in the payment of the principal and interest on one and all of said promissory notes and notice of election and demand for sale in writing having been duly

filed with the Public Trustee, the said premises were, on the 17th day of March, A. D. 1908, by the Public Trustee, duly advertised for sale at public auction on the 15th day of April, A. D. 1908, at the East Front door of the County Court house in the County of Teller and State of Colorado, in the manner provided by said trust deed, which notice of sale was published previously in *The Cripple Creek Times* for the period of Four weeks and a printed copy of

127 said notice of sale was duly mailed by the Public Trustee to the grantor in said Deed of Trust and subsequent encumbrances, as provided by law.

And said premises were, upon the day and year, and at the place mentioned aforesaid, in pursuance of said notice of sale, sold at public auction, and at the said sale Felix O. Poston was the highest and best bidder, and bid for the tract hereinafter described the sum of Twenty Thousand (\$20,000) Dollars, and a certificate of purchase was made and given therefor.

And the said Felix O. Poston having duly assigned his certificate of purchase to The Gold Issue Mining and Milling Company.

Now, therefore, these presents witness, That the said party of the first part, in pursuance of the power and authority in him vested in and by the said trust deed, and by virtue of the provisions of the statute in such cases made, and in consideration of the sum of one dollar, and also the further sum of Twenty Thousand Dollars, to the Public Trustee heretofore in hand paid by the said Felix O. Poston, the receipt whereof is hereby acknowledged, hath and doth hereby convey, remise, release and quit-claim to the said party of the second part, heirs and assigns forever, all the right, title and interest, as well in law as in equity, which the Public Trustee hath acquired by virtue of the trust deed above mentioned, of, in and to all the following described tracts, pieces or parcels of land, situate, lying and being in the County of Teller and State of Colorado, to-wit: The

lode mining claim (Faithful) Lot No. 11346; lode mining
128 claim (Queen of Sheba) Lot No. 10655 and mining claim

Poleston, part survey lot No. 10197 containing 1.282 acres; and mining claim known as "Overlooked"; also frame mill building and all additions and permanent fixtures attached thereto, engines, boilers, machinery, stamps, batteries, crusher, grinders, belting, conveyors, tools, vats, tank; and all other machinery fixed or movable; horse, wagon, harness and other personal property situated on the "Faithful" mining claim, subject to a prior Trust Deed recorded November 1st, 1906, in Book 116, page 238, filed with Recorder of Teller County, Colorado.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, claims and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and any and every part thereof, with the appurtenances which the said party of the first part acquired by virtue of said trust deed; and all the right, title, benefit and equity of redemption of The Wishbone Gold Mining Company, heirs and assigns therein.

To have and to hold The aforesaid right, title and interest of the said party of the first part unto the said party of the second part, their heirs and assigns forever, as fully and absolutely as the said party of the first part can, by virtue of the power and authority in him vested by said trust deed, convey the same.

129 In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

MOLLIE E. O'BRYAN, [SEAL.]
Public Trustee in the County of Teller Aforesaid.

STATE OF COLORADO,
County of Teller, ss:

I, David W. Kilpatrick, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Mollie E. O'Bryan, Public Trustee in said County, known to me to be such, and who is personally known to me to be the person whose name is subscribed to the foregoing Deed, as such Public Trustee, appeared before me this day in person, and acknowledged that as and in the capacity of Public Trustee in the County aforesaid, he signed, sealed and delivered the said instrument of writing as his free and voluntary act and deed, for the uses and purposes therein specified.

My Notarial commission expires Jan'y 11th, 1913. Given under my hand and Notarial seal, this Fifth day of May A. D., 1909.

[SEAL.]

DAVID W. KILPATRICK,
Notary Public."

The deed, Exhibit 8, bears the following marking on the back thereof:

"Public Trustee's Deed by Mollie E. O'Bryan, Public Trustee, to The Gold Issue Mining & Milling Company.

STATE OF COLORADO,
County of Teller, ss:

I hereby certify that this Deed was filed for record in my office at 10:36 o'clock A. M. May 6, 1909, and is duly recorded in book 15, page No. 478.

A. W. GRANT, *Recorder,*
 By C. A. VANATTA, *Deputy."*

130 Mr. Fauntleroy: Can I speak to the witness a minute to get some papers that he has got here?
 Mr. Herrington: Certainly.

Q. Now, Mr. Depke, in this deed, deeding you this property, it is mentioned "subject to a prior trust deed recorded November 1st, 1906, in Book 116, Page 238, filed with the Recorder of Teller County, Colorado." What mortgage was that?

A. The mortgage of the Wishbone Gold Mining Company to Lawrence McDaniel.

Q. You got that mortgage?

A. Yes, sir.

Q. State whether or not that mortgage had been fully paid and satisfied when you got that property?

A. Yes, sir.

Q. Have you got it there?

Mr. Herrington: Let's not encumber the record. We are in no position to dispute you, if he says it has been paid.

Mr. Fauntleroy: We have Mr. McDaniel here himself to put on the stand to show that it had been paid. That will relieve the record.

Mr. Herrington: That has been released of record, hasn't it?

Witness: Yes, sir; it was released June 1st, 1908.

Mr. Fauntleroy: Yes, I take back what I said.

Mr. Herrington: I am satisfied. Let me have the note if you have it.

Mr. Fauntleroy: Here's the note and here's Mr. McDaniel here.

131 Mr. Herrington, I don't want to encumber the record unnecessarily. You make no point on the fact that I don't formally introduce the release?

Mr. Herrington: If you will have Mr. Depke say that the release is correct and proper itself, and that the note is paid, and for Mr. McDaniels paid.

Q. Yes, sir. This note was paid before the plaintiff got title to the property?

A. Yes, sir.

Q. And the note surrendered up and cancelled?

A. Yes, sir.

Mr. Fauntleroy: Let me make a suggestion: Mr. McDaniels is a lawyer we brought up here, and like all lawyers in St. Louis, we are poor and have to make a living, and if I may withdraw, I will put him on and show it was paid and released before the title to the property was got.

Mr. Herrington: But was it released of record? The deed of trust still stands of record?

The Court: What does the release show? Does it show that it is on record or not?

Mr. Robertson: We are going for the record.

Mr. Fauntleroy: The Recorder of Deeds in certifying it termed it a chattel mortgage. I will put Mr. McDaniel on the stand.

LAWRENCE McDANIELS, being duly sworn, testified as follows, to wit:

Direct examination by Mr. Fauntleroy:

Q. You live in St. Louis?

A. Yes, sir.

132 Q. How old are you?

A. Twenty-eight.

Q. What is your business?

A. Lawyer.

Q. Are you the gentleman who held the eighty-five hundred dollar mortgage which has been mentioned, a note?

A. Yes, sir.

Q. Which was recorded in Book 116, Page 238 in the records of the office of the Recorder of Teller County? It is the one mentioned at this time which has been put in evidence?

A. Yes, sir.

Q. Which I show you?

A. Yes, sir.

Q. State whether or not that note was paid and released?

A. Yes, sir.

Q. Talk so the jury can hear you?

A. Yes, sir.

Q. What date?

A. June 1st, 1908, I believe it was.

Q. And from that time on you have had no debt or lien upon this property?

A. No, sir.

Cross-examination by Mr. Herrington:

Q. Are you interested in this company?

A. No, sir.

Q. You just made the loan yourself?

A. No, sir; it wasn't my personal loan.

133 Q. You had no interest?

A. No, sir.

Q. This was just a book clipping proposition with you?

A. Yes, sir.

Mr. Fauntleroy: If we should try any other of the cases can this same testimony of this witness be used in the other cases?

The Court: You can reach him by wire, I suppose.

J. F. W. DEPKE, being recalled, testified as follows, to wit:

Direct examination by Mr. Fauntleroy:

Q. How did this, if you know—, did it come that in this deed which has been given in evidence by which the plaintiff got title, the property, this clause "subject to prior trust deed recorded November 1st, 1906, in Book 116, Page 238, filed with the Recorder of Teller County, Colorado," was put in there?

A. That was a clerical error on the part of George E. Kina, who was public trustee at the time the sale took place. Mr. Boston brought in the property under that trust deed, and Mr. Kina took the whole deed and entered the mistake in this deed.

Q. He didn't know it had been paid and released?

A. No, sir. Although it was paid and released at that time. It was simply a clerical mistake on the part of Mr. Kina.

Q. Have you got that note?

A. Well, I think—

134 The Court: Let me understand. Which exhibit do you offer? Do you offer the deed of trust and the note or not?

Mr. Fauntleroy: No, I wasn't offering the note of the release of it. Mr. Herrington suggested not to encumber the record; that simply if the witness would swear to it they would accept it.

Mr. Herrington: I said there was no use of introducing that deed of trust which was recited in the deed from the trustee to the plaintiff company. The deed of trust—it was deeded—

Mr. Fauntleroy: Well, then, I offer in evidence the release of Lawrence McDaniel dated the first day of June, 1908.

The Court: That's Exhibit 9.

Mr. Herrington: Object to it. It isn't an original. It purports to be a certified copy from the county clerk and recorder of Teller County, and hasn't been certified under a great long form that you have here in the statutes of 1909 in Missouri.

The Court: Is that the only objection you make?

Mr. Herrington: Yes, sir.

The Court: Objection overruled. It will be admitted in evidence. To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

The above paper, Exhibit 9, is in words and figures as follows, to-wit:

135

EXHIBIT 9.

In consideration of the payment of the debt named therein, I release the mortgage made by The Wishbone Gold Mining Company to me on the seventh day of September, 1906, to secure the payment of Eight thousand five hundred (8,500 00-100) — and interest at 6 per cent *Dollars*, payable on the seventh day of December, 1906, and on file in the office of the County Clerk and Recorder in Teller County, State of Colorado, in Book 116, page 283 of records of said County.

Witness my hand, this First day of June 1908.

LAWRENCE McDANIEL.

In presence of
MARGARET RILEY.

STATE OF MISSOURI,
St. Louis City ss:

On this First day of June, 1908, before me, William F. Klanke, a Notary Public, duly commissioned and qualified for, and residing in said City, personally came Lawrence McDaniel to me personally known to be the person whose name is subscribed to the above release as maker, and acknowledged the said instrument to be his voluntary act and deed.

Given under my hand and Notarial Seal, this First day of June, 1908.

My Commission expires Nov. 11, 1911.

[NOTARIAL SEAL.]

WILLIAM F. KLANKE,

Notary Public.

Release of Chattel Mortgage. Lawrence McDaniel to the Wishbone Gold Mining Co., Cripple Creek, Colo.

136 STATE OF COLORADO,
County of —, ss:

I hereby certify that this instrument was filed for record in my office at 12 o'clock M., Jany. 19, 1909, and is duly recorded in Book —, Page No. —.

A. W. GRANT, Recorder,
By M. J. WALSH, Deputy.

(Certified Copy.)

STATE OF COLORADO,
County of Teller, ss:

I, Thos. T. Barnard, County Clerk and Recorder in and for said County and State, do hereby certify that the within and foregoing is a full, true and correct copy of Release Chattel Mortgage Lawrence McDaniels to Wishbone G. M. Co., No. 67201 as it appears of record in my office in Book 127 at page 83.

Witness my hand and official seal at Cripple Creek, Colo., this 8th day of Mar., 1912. Issued to J. F. W. Doepke.

THOS. T. BARNARD,
County Clerk and Recorder, Teller County, Colo.,
By C. A. VANATTA, Deputy."

No. 9. Fee 75c.

Mr. Fauntleroy: I want you to see the book, 116, Page 238. I will show that to the jury. I now offer the note marked "cancelled," Exhibit 10.

Mr. Herrington: No objection to the note.

Exhibit 10 is admitted in evidence and read to the jury and is in words and figures as follows, to-wit:

"\$8,500.00.

St. LOUIS, Mo., Oct. 9th, 1906.

Three months after date we promise to pay to the order of
137 Lawrence McDaniel Eight thousand, five hundred and no-100
Dollars. For value received negotiable and payable without
defalcation or discount with interest at the rate of six per cent per
annum from date. Payable at office Equitable Bldg., St. Louis, Mo.

THE WISHBONE GOLD MINING CO.
J. F. W. DOEPKE, President."

THE WISHBONE GOLD MINING CO.
EDWARD CORNET, Sec'y.

The above note bears the following endorsement on the back thereof: "Without recourse on me Lawrence McDaniel, April 24th, 1908. For value received I hereby assign my interest to the within note to The Gold Issue Mining & Milling Co., Lawrence McDaniel."

Mr. Fauntleroy: I now offer this deed of trust, Exhibit 11, which is the deed of trust given to secure this note.

Mr. Herrington: I don't think there is a need of encumbering the record. I said that we would agree on that.

The Court: I don't see that it encumbers the record.

Mr. Fauntleroy: Our friend says that he will agree that it has been released.

Mr. Herrington: I say let the papers show what they are, and that is the deed of trust upon which you have been seeking to show release and mentioned in the deed upon which you got the property.

138 The Court: The deed of trust will be considered in evidence.

The above deed, Exhibit 11, is in words and figures as follows, to-wit:

EXHIBIT 11.

Deed of Trust.

"This deed, Made and entered into this Ninth day of October, Nineteen hundred and Six, by and between The Wishbone Gold Mining Company, a corporation doing business at Cripple Creek, Colorado, by J. F. W. Doeple, President and Edward Cornet, Secretary, of the city of Cripple Creek and State of Colorado, parties of the first part, and J. A. Duffy of the city of St. Louis and State of Missouri, party of the second part, and Lawrence McDaniel of the city of St. Louis and State of Missouri, party of the third part, Witnessest: That the said parties of the first part, in consideration of the debt and trust hereinafter mentioned and created, and of the sum of one dollar to them paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents, Grant, Bargain and Sell, Convey and Confirm, unto the said party of the second part, forever, all the following described real estate, situate in the City of Cripple Creek, State of Colorado, and known and described as follows, to-wit: The lode mining claim known as the Faithful, designated by the Surveyor General as Lot No. 11346, embracing a portion of section twelve, in township fifteen, south

of range seventy, west sixth P. M. more particularly de-
139 scribed in the United States Mineral certificate No. 2,501, dated May 18th, 1901 and filed for record with Recorder of

Teller County, Colorado, April 9th, 1906, in Book 132, page 70 — Also the lode Mining claim known as the Queen of Sheba, designated by the Surveyor General as Lot No. 10,655, embracing a portion of sections six and seven, in township fifteen south of range sixty-nine west, Sixth P. M., more particularly described in the United States Mineral certificate No. 2,537, dated October 17th, 1901, and filed for record with Recorder of Teller County, Colorado, April 9th, 1906, in Book 132, Page 69 — also all improvements of said claims, likewise frame mill building, including all additions and permanent fixtures attached thereto. Engines, Boilers and Machinery, Stamps, Batteries, Crusher, grinders, tools, vats, tanks and all other machin-

ery, fixed and movable; all contained and occupied as a Cyanide Mill situate on the Faithful lode of the Wishbone Gold Mining Company, all situate in what is known as the Cripple Creek Mining District, State of Colorado. And the possession of said described premises is now delivered unto the said party of the second part."

STENOGRAHHER'S NOTE.—Across the face of the deed is written with pen and ink in large letters the word "cancelled."

"To have and to hold the same, with the appurtenances, to the said party of the second part, and to his successor or successors in this trust forever. In trust, however, for the following purpose:

Whereas, the said Wishbone Gold Mining Company, by J. F.
140 W. Doeple, President and Edward Cornet, Secretary have
executed and delivered to the party of the third part one
negotiable promissory note of even date herewith, drawn to the order
of Lawrence McDaniel, one Principal Note for Eight Thousand Five
Hundred Dollars and 00-100 cents, (\$8,500.00), dated October 9th,
1906, payable three months after date, with interest six per cent
(6 per cent) per annum, it having been agreed between the parties
hereto, that when one of the said notes, whether of interest or
principal, after having become due and payable, should remain un-
paid, then all of said notes should become due and payable at once,
whether due on their face or not, to secure the payment of which
said notes the parties of the first part have executed this Deed of
Trust, and have also agreed with said third party, his endorsees and
assigns, to cause all taxes and assessments, general and special, to be
paid whenever imposed upon said property, and within the times
required by law; and also to keep the improvements upon said
premises constantly and satisfactorily insured, until said notes are
all paid, against fire, lightning and gasoline, in the sum of Twenty
Thousand and 00-100 Dollars, and against windstorms, tornadoes
and cyclones, in the sum of — Dollars, and the policy or policies
therefor to keep constantly assigned unto the said party of the
second part, for further securing the payment of said note, and
the same apply towards the payment of said note, unless otherwise
paid, when they become due as aforesaid. And the said parties of

141 the first part hereby guarantee to the said party of the third
part, that the said property herein described is free and clear
of mechanics' liens; and said parties of the first part further
agree that, in case any liens should hereafter be filed against said
property, after the execution of this Trust, then, and in that case,
said liens so filed shall have the same force and effect as if any one of
said notes, hereinbefore described, shall have become due and pay-
able, and all the covenants and agreements herein provided shall be
in full force and effect, and carried out as if said note was actually
due and payable. And in the event of the said party of the third
part, or his assigns or legal representatives, or the party of the second
part, or his successors in trust, shall expend any money to protect
the title or possession of said premises, or for such insurance as
aforesaid, then all such money so expended shall be a new and ad-
ditional principal sum of money secured by this instrument, and

shall be payable on demand, and may be collected with interest thereon at the rate of eight per centum, per annum from the time of so expending the same.

Now Therefore, if the said parties of the first part, or their legal representatives or assigns, shall well and truly pay, or cause to be paid, unto the holders thereof, respectively, all and singular the said promissory notes above mentioned, at maturity thereof respectively, according to the tenor of the same, and shall well and truly keep and perform all and singular the several covenants and agreements hereinbefore set forth, then this trust shall cease and be

void, and the property hereinbefore conveyed shall be released at the cost of the said parties of the first part; but if either one of said notes, or any part thereof, be not so paid at maturity, according to the tenor of the same, or if default be made in due fulfillment of said covenants and agreements, or either of them, then this conveyance shall remain in force, and said party of the second part, or, in case of his death or absence from the city, or any other disability, or refusal to act, his successor in this trust, may proceed to sell the property hereinbefore conveyed, or any part thereof, at public vendue, or outcry, at the Court House in the City of Cripple Creek, State of Colorado, provided that in the event of there being no *such* at and on the date of advertisement herein provided for, then at the east front door of the Court House in said City of Cripple Creek, State of Colorado, to the highest bidder for cash, first giving twenty days' notice of the time, terms and place of said sale, and of the property to be sold, by advertisement published in some newspaper printed in the City of Cripple Creek, State of Colorado, and upon such sale shall execute a deed in fee simple of the property sold to purchaser or purchasers thereof, and shall receive the proceeds of such sale—out of which he shall pay, First, the cost and expense of executing this Trust, including lawful compensation of said Trustee, and also an auctioneer's fee of Five Dollars for each parcel of land sold hereunder; and, next, he shall repay to any person or persons who may or shall, under the covenants hereinbefore set forth, have advanced, or paid any money for taxes, mecha-

nics' liens or insurance, as above provided, all sums so by him 143 or them advanced and not already repaid, together with interest thereon at the rate of eight per centum per annum from date of such advance till day of payment; and, next, the amount unpaid on said notes, together with the interest accrued thereon, and the remainder, if any, shall be paid to the parties of the first part, or their legal representatives. And the said party of the second part hereby lets said premises to the said parties of the first part and assigns until this instrument be released and satisfied, or until a sale be made under the provisions of this deed of Trust, upon the following terms, to-wit: The said parties of the first part, and every persons claiming or possessing such premises or any part thereof, shall pay rent therefor during said term at one cent per month, payable upon demand, and shall and will surrender peaceable possession of said premises, and any and every part thereof sold under said provisions to said party of the second part, or purchaser

thereof under such sale within ten days after such sale and without notice or demand therefor. Provided, however, that nothing in this Deed shall be so construed as to prevent the legal holders of said notes or any one of them to have and to take every legal step and means to enforce payment of said note, without having first executed this Deed of Trust.

And the said party of the second part covenants faithfully to perform and fulfill the trusts created.

144 In Witness Whereof, The said parties of the first part have hereunto set their hands and seals on the day and in the year first above written.

THE WISHBONE GOLD MINING CO.
J. F. W. DOEPKE, President. [SEAL.]

[Corporate Seal The Wishbone Gold Mining Co.]

EDWARD CORNET, Sec'y.

Attested.

STATE OF MISSOURI,
City of St. Louis, ss:

On this 9th day of October, 1906, before me personally appeared John F. W. Doeple and Edward Cornet, respectively President and Secretary of the Wishbone Gold Mining Company, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed of The Wishbone Gold Mining Company.

In testimony whereof, I have hereunto set my hand and affixed my official seal in the City of St. Louis, Mo., the day and year first above written.

My term expires November 15th, 1907.

[SEAL.]

WILLIAM F. KLANKE,
Notary Public."

STENOGRAPHER'S NOTE.—The foregoing deed bears the following endorsements on the back thereof: Deed of Trust, Recorded in Book 116, Page 238, From The Wishbone Gold Mining Company To Lawrence McDaniel. Filed for Record 1st day of Nov., A. D. 1906, at 8 o'clock 45 minutes A. M. W. E. Dingman, Recorder, by Leo Logans, Deputy.

145 STATE OF COLORADO,
County of Teller, ss:

In the Recorder's Office.

I, W. E. Dingman, Recorder of said County of Teller, do hereby certify that the within instrument of writing was, at 8 o'clock and 45 minutes A. M., on the 1st day of Nov. A. D. 1906, duly filed for Record in this office, and is recorded in the records of this office, in Book 116 at Page 238.

In witness whereof, I have hereunto set my hand and affixed my

official seal at Cripple Creek, Colo., this 1st day of Nov., A. D. 1906.

[SEAL.]

W. E. DINGMAN, *Recorder.*
LEO LOGANS, *Deputy.*"

Mr. Fauntleroy: Will you gentlemen let me have the services of Mr. Depke off the stand a minute to find the paper?

Mr. Herrington: Yes, sir.

Q. Have you got the tax receipts?

A. Yes, sir.

Q. Mr. Depke, state whether or not the Gold Issue Mining and Milling Company, the plaintiff, had paid the taxes — been assessed and paid the taxes to the County of Teller and State of Colorado?

A. Yes, sir.

Q. Since you have owned the property from the years 1909 and 1910?

Mr. Herrington: If the court please, we object to that; absolutely immaterial to any issue in the case whether or not they paid the taxes to Teller County or any other place. I can't see what difference it will make in the case if he expects to show an estoppel on the State of Colorado; he hasn't pleaded any law to show that it would work as estoppel on that state, and under the decisions of your own courts it couldn't affect any issue which has been raised by the defendant.

The Court: It might tend to prove there was no tax lien encumbering the property. I don't see that it was material.

Mr. Fauntleroy: We pleaded that we were assessed and paid it and took receipts for it. Now, I am perfectly frank to say on the theory of estoppel, it bears upon nobody but the state. The state recognized our title. It assessed this plaintiff as the owner of that property and took our taxes and issued receipts for it. Now, I will follow it up by showing they gave a license by and with the decisions which say in the 101st Pacific, they say that if the license is paid even after a case gets into the Supreme Court that that is sufficient.

The Court: Well, you might offer them again later but at this time they don't seem to be material.

Mr. Fauntleroy: I will identify what they are. Mark those two. I have pleaded this tax and these receipts in my reply. Mark these Exhibits 12 and 13.

Q. What are these two papers, showing you Exhibits 12 and 13?

Objection by Mr. Robertson.

The Court: They speak for themselves.

Mr. Fauntleroy: They can't speak for themselves as far as the signatures go.

Mr. Robertson: That's made a part of the paper in all our objections.

147 The Court: At this time the court will exclude those two.

Mr. Fauntleroy: I now offer Exhibit 12, and offer to show that Harry Henry was the county treasurer and signed that receipt and took the money and paid it into the treasury of Teller County, taxes on this property 1909.

The Court: Objection sustained.

Mr. Fauntleroy: And a similar receipt for the year 1910.

The Court: Objection sustained.

Mr. Fauntleroy: Note an exception in each instance.

Cross-examination by Mr. Herington:

Q. Mr. Depke, what has been your business the last few years?

A. Mining and milling.

Q. In the City of Cripple Creek?

A. City of Cripple Creek, vicinity, and also in Gilton County, Colorado.

Q. You have extended your operations to Gilton County?

A. Yes, sir.

Mr. Fauntleroy: Excuse me one moment. I forgot one thing.

Mr. Herrington: Yes, sir.

Redirect examination by Mr. Fauntleroy:

Q. Have you got that certificate of incorporation?

A. I believe Mr. Shaw has it.

Q. Where is that book that you had? You may have put it in that.

148 A. I will find it—here it is.

Mr. Fauntleroy: Will you mark that Exhibit 14, that is the certificate of authority.

(Stenographer marks paper Exhibit 14.)

Q. When did your company get authority from the State of Colorado to do business, certificate of authority?

A. January 10th, 1911.

Mr. Fauntleroy: I now offer that in evidence, Your Honor.

Mr. Robertson: We object. We object for the reason that the exhibit offered shows that it was given on the 10th day of January, 1911, and there is no law—has been introduced in evidence—no law of the State of Colorado has been introduced in evidence to show the relation that certificate has to the case at this time. If it be based upon the idea it is necessary to have a certificate to do business in that state then it is no defense in this case; doesn't put plaintiff in any better position because the authority was acquired long after these transactions were closed.

The Court: Except upon the theory that it would relate back.

Mr. Fauntleroy: Yes, sir.

The Court: It is purely a question of law.

Mr. Fauntleroy: Yes, sir; a question of law.

The Court: One that at this time the court is not advised about. There may be a decision in the Pacific reports which I am not familiar with; I can see no objection to admitting it at this time, and considering the effect of the paper later. The objection will be overruled. Exhibit 14 will be admitted.

149 To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

The above paper, Exhibit 14, is in words and figures as follows, to-wit:

EXHIBIT 14.

State of Colorado.

Office of the Secretary of State.

Certificate of Authority.

I, James B. Pearce, Secretary of State of the State of Colorado, do hereby certify that on the tenth day of January, A. D. 1911, at the hour of 4:09 o'clock P. M., there was filed in my office a certificate of incorporation of The Gold Issue Mining and Milling Company (Cripple Creek, Colorado).

Now, therefore, pursuant to the provisions of Section ten (10) of an act entitled "An Act Relating to Corporations and prescribing certain fees to be paid by corporations, foreign and domestic, and repealing certain Acts and all Acts and parts of Acts in conflict herewith," approved April 6, 1901. I do further certify that the said The Gold Issue Mining and Milling Company (Cripple Creek, Colorado), has made full payment of all fees and taxes authorized by law to be paid to the Secretary of State and due at the time of the issuance of this certificate.

In Testimony Whereof I have hereunto set my hand and affixed the Great Seal of the State of Colorado, at the City of Denver,
150 this tenth day of January, A. D. 1911.

[SEAL.]

JAMES B. PEARCE,

Secretary of State.
THOMAS F. DESHONG, Deputy."

Mr. Fauntleroy: You will waive the formal reading of it?

Mr. Herrington: Yes, sir.

Mr. Fauntleroy: I offer in evidence the receipt from the Secretary of the State of Colorado, dated January 10th, 1910, of the payment of the fees in connection with this certificate.

Mr. Herrington: The same general objection.

The Court: Objection overruled. It will be considered in evidence.

To which ruling of the court, the defendant then and there by its counsel duly excepted and saved its exceptions.

Q. You paid those as all the fees that were owing the State of Colorado and got your certificate?

A. Yes, sir.

Q. The dates mentioned in there?

A. Yes, sir.

Mr. Fauntleroy: Mark that Exhibit 15; offer that.

The Court: Exhibit 15 will be considered in evidence.

Exhibit 15 is in words and figures as follows, to-wit:

EXHIBIT 15.

DENVER, COLORADO, 1-10-11.

The Gold Issue Mining and Milling Company (Cripple Creek, Colorado) to the Secretary of State of the State of Colorado, Dr.

| | |
|--|----------|
| To Filing Articles of Incorporation..... | \$465.00 |
| To Certificate of Authority..... | 5.00 |
| To Filing Certificate of Business and Agent..... | 5.00 |
| To Filing Laws of..... | 5.00 |

\$480.00

Received Payment Jan. 10, 1911.

JAMES B. PEARCE,

*Sec'y of State,*By ROY L. PATTER, *Cashier.*We. E. SARTORIOUS, *Clerk.*"

STENOGRAPHER'S NOTE.—Attached to the foregoing sheet of Exhibit 15 is the following sheet:

"James B. Pearce, Secretary of State.

Thos. F. Dillon, Jr., Deputy.

Receipt.

Annual Corporation License Tax.

State of Colorado,

Office of Secretary of State.

Capitol Building,

(Cripple Creek, Colo.)

Denver.

The Gold Issue Mining & Milling Co., Fred L. Shaw, Cripple Creek, Colo., to Secretary of State, Dr.

| | Tax. | Penalty. | Total. |
|--------------------------------------|---------|----------|---------|
| For year ending April 30th, 1912.... | \$30.00 | .... | \$30.00 |

Articles 1-10-11.

Capital Stock, \$1,500,000.

Clerk, Hicks.

Pay Cashier.

Received Payment, Jan. 10, 1911.

JAMES B. PEARCE,

*Sec'y of State,*By ROY L. PATTER, *Cashier.*

policies, or at the time of this fire, have any ownership or claim to this property?

A. No, sir.

Cross-examination by Mr. Herrington:

Mr. Robertson: Both of these papers are offered in evidence?

Mr. Fauntleroy: Yes, sir.

The Court: I understand they are both part of the same paper.

Q. When I was interrupted you said you operated in Giltor County, Colorado?

A. Yes, sir.

Q. What had been your business before that?

A. I was in the mercantile business for about ten or twelve years.

Q. Where?

A. St. Louis, Missouri; manufacture.

Q. What business had you been in before that, or occupation?

A. Well, my occupation since I was a boy; I first became a bookkeeper, and then become a partner of the man I worked for, and conducted the business after his death for quite a number of years, and then I had considerable money standing out, and knowing a little about law, and I thought I would start a collecting agency to collect my accounts, but I was in mining even while I was in the manufacturing business. I was interested in mining and milling.

153 Q. Did you ever do any insurance business?

A. Absolutely none.

Q. Did you ever—you have had other policies of fire insurance?

A. That is, mercantile business?

Q. Yes.

A. Yes, sir.

Q. You at one time had an office in St. Louis, Missouri, under the title of "Law and Collection Office of J. F. W. Depke and Company?"

A. Yes, sir. My brother-in-law was an attorney-at-law, and consequently, if you have any idea of the mercantile business, when you quit business it is pretty hard to collect outstanding accounts.

Q. You studied law some yourself?

A. Well, yes; I have read law, but I haven't practiced because I didn't have the opportunity.

Q. When did you first start operations under this new company, the plaintiff?

A. The Gold Issue Mining and Milling Company?

Q. Yes, sir.

A. Upon the organization, April 23rd, 1908; that's the beginning.

Q. It is a corporation?

A. Yes, sir; under the laws of Arizona.

Q. And it has capital stock divided into shares?

A. One million five hundred thousand shares.

Q. It isn't a charitable institution?

A. No, sir.

Mr. Fauntleroy: I object. The articles will show.

Q. It isn't a charitable institution, is it?

154 Mr. Fauntleroy: I don't know. It will be when we have to give you fifty thousand dollars insurance.

Mr. Herrington: We will take this up later.

Mr. Fauntleroy: I should say we are a charitable institution. Up-to-date we have given premiums and we are giving you the policy.

Mr. Herrington: I didn't ask you the question.

Q. I will ask you, that you have written other insurance when you were in the mercantile business?

A. Yes, sir.

Q. And studied some law?

A. I did; I read law, yes, sir.

Q. Did you get as far as "Contracts" in your reading of law?

A. Yes, sir; I did.

Q. Whom did you read on "Contracts"?

A. Judge Douglass.

Mr. Fauntleroy: You didn't get any law under him, then.

A. It happened my partner was named Douglass.

Q. You continued to operate this company down to the date of the fire?

A. Yes, sir.

Q. Being manager of the men in your employ?

A. Yes, sir.

Q. Did the ordinary business which is associated with a mining and milling company?

A. Yes, sir.

Q. Will you look at Exhibit A, being the policy sued on, and will you read the "watchman's clause?"

155 A. Yes, sir.

Q. That's on the rider?

A. Yes, sir.

Q. You understand what a rider is?

A. Yes, sir; I did since I have been getting insurance from Kilpatrick and Hanley because it is necessary to have them on when you have insurance in Cripple Creek.

Q. Then you understand the riders are necessities in Cripple Creek?

A. Yes, sir. (Witness reading:) "It is warranted by the insured that whenever any of the following named parts of the plant, described by this policy, viz., Main Building and Edwards Roaster, is idle or not in operation, from any cause whatever, a watchman shall be employed and due diligence used to keep a continuous watch both day and night immediately about said part of the plant. If any of the above named parts is idle or not in operation for a period of more than thirty days, without written consent of this company, this policy shall be void."

Q. That was the rider which was attached to your policy?

A. Yes, sir.

Q. When you took it away from Mr. Kilpatrick and Hanley's office?

A. Yes, sir.

Q. How soon after the date of the policy did you take the policies with you?

A. Well, I couldn't answer that really because I left that with Mr. Kilpatrick at his convenience to turn them over. It 156 was during the month of October, possibly.

Q. You got them out during the month of October and kept them in your possession throughout the time until they were filed in this court or were into the hands of your attorney?

A. Yes, sir.

Q. This clause was on there attached to this policy when he issued it to you the same as it is now?

A. Yes, sir.

Q. Now, going into that part of the clause "if any of the above named parts" (referring to the main building and Edwards roaster). In other words, that part of the plant ought to have a man most of the time there?

A. Which do you mean?

Q. I mean the Edwards roaster, which is in the main building?

A. No, sir, it is separate and discontinued and was not insured.

Q. The Edwards roaster is a process of taking the sulphur out of the ore?

A. Yes, sir, out of the sulphide ores.

Q. Will you explain this process to the jury so they may understand? First, we get the crude ore?

A. Yes, sir.

Q. And then it goes through a crusher?

A. Yes, sir; then through coarse rollers, then through finishing rolls.

Q. Goes from one to the other?

157 A. Automatic; and then is taken up by elevator into the roaster.

Q. There has been no operation on the ore at this time except mechanical?

A. Yes, sir, the roaster is forty feet away from the main building.

Q. It goes to the roaster?

A. Yes, sir.

Q. And there it is roasted for the purpose of what?

A. Sixteen hundred to eighteen hundred degrees Fahrenheit, and the ore is carried to the size or a little larger than by two sets of nables; the heat takes the sulphur out of the refractory ore; it is about eleven or ten per cent. Then it is discharged into a cooler that also has rabbles; the air that passes through the cooler cools off the ore that's been roasted. It is warm when it comes from the roaster. From there it is carried to the Chilean mill. It is like a very large coffee mill, and that grinds fine the ore, very fine, with a weak solution of cyanide, and then is discharged on blanket tables about twenty feet by ten feet wide. The solution, the gold is in this solution.

Mr. Fauntleroy: You are intoxicating us.

A. I am giving it to you from A to Z. If you will permit a few words.

Q. You took it from the roaster?

A. Yes, sir.

Q. Now, we have insured the Chilean mills?

158 A. Yes, sir, and then into the cooler, and then is carried to the Chilean grinding machine.

Q. From there it goes where?

A. It is discharged on two blanket tables which captures fifty per cent of the gold in the ore, and from there it is pumped into a receptacle (I have forgot the name), and it is resolved and carried into the separator; from there it is discharged into tanks and finally into the gold tanks and then into the zinc boxes and that catches what is not caught on the table. From there the chemist takes charge, and makes gold bars out of the black slimes, which looks like black pitch.

Mr. Fauntleroy: And from there it goes into the United States Government.

A. It is a very nice business; it is an honest business.

Q. Will you read from Exhibit A at the bottom—at the close of the contract?

A. The rider, you mean?

Q. No. Reading from the bottom "this policy is made"?

A. (Witness quoting:) "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and 159 as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Q. Now, then, a part of this provision which you might permit you to be idle thirty days was attached to the policy?

A. Yes, sir.

Q. According to the conversation you said you had with Mr. Kilpatrick you wanted the proviaion that it should remain idle sixty days?

A. No, sir, there was no stipulation of time. In this first conversation with him I first notified Mr. Kilpatrick that the mill was going to be shut down.

Q. So you saw Mr. Kilpatrick and you don't claim that he ever gave you any consent in writing to this idle operation?

A. No, sir. I considered Mr.—

Q. Wait a minute.

Mr. Fauntleroy: Let him answer the question.

The Court: The question called for an answer yes or no.

Q. Yes, sir. You have answered it. You said you didn't claim you had any written consent from anybody.

A. No, sir.

Q. Now, in relation to this chattel mortgage on a portion
160 of this property. It appears that Mr. Kilpatrick, Kilpatrick
and Hanley wrote you a letter that some of the insurance
companies had got on to the fact?

A. Yes, sir. One insurance company.

Q. You had discussed this proposition of the insurance companies
getting on to the fact of the chattel mortgage with Kilpatrick.

A. Slightly.

Q. And Kilpatrick in reference to this matter agreed to protect
you against the insurance company?

A. Everything that I did was all right; that is, he was satisfied.

Q. Didn't you have an understanding with him that if these other
insurance companies got on to the fact there was a chattel mortgage
and cancelled that he would write you in other companies?

A. No, sir, there was no understanding.

Q. Did you, in your relations with Kilpatrick, in your talks, have
any conversation with him about if the companies got on to the fact
that if the mill was idle and not in operation what would take place?

A. No, sir.

Q. You never had any talk with him concerning that?

A. No, sir.

Q. Did you supplement your talks with Mr. Kilpatrick concerning
the mill being idle and out of operation by any letters to Mr.
Kilpatrick?

A. I may have time and again, probably.

Q. Time and again?

161 A. Yes, sir.

Q. Have you been sort of in conference with the attorneys
here in relation to the preparation of the case?

A. Not to any great extent.

Q. Wouldn't you have to be called on to get the papers?

A. Mr. Fauntleroy asked me for the receipt yesterday evening
and I thought I would help him find it.

Q. Do you know of your attorneys demanding some letters written
to Kilpatrick and Hanley, two letters in relation to your statement
that the mill was idle and not in operation, some time along in
February, 1910, and April, 1910?

A. No, sir.

Q. You do not?

A. No, sir.

Q. You knew in relation to carrying this insurance that the
agents had to pay the premium within sixty days after the policy
was issued.

A. I didn't know as to the time.

Q. No, but you knew the agents had to make good with the company
within some time.

A. I knew nothing about insurance business. I don't know what requirements are expected by the companies with the agents. My business was with the agent and not the company.

Q. You said you had a talk with Mr. Kilpatrick?

A. Yes, sir; about the 15th of January we shut down, or January 10th, 1910; about that.

162 Q. Why did you have this talk with him about being idle and not in operation?

A. For the reason that I had received letters from Mr. Quinn, general manager of the Colorado Coal Company, who is the monopoly of the coal business—

Mr. Herrington: Well, now, I object.

Mr. Fauntleroy: Let him answer.

Mr. Herrington: He says he is a monopoly.

A. That's showing he had control of the coal. Notifying us that on account of the scarcity of coal they would have to curtail our supply. I called on Mr. Kilpatrick to let him know of the condition on account of the vacancy clause, because I wanted no misunderstanding.

Q. You had read the provision that I have asked you to read as to the "watchman's clause"?

A. Yes, sir, I was very familiar with that.

Q. And you had considered that at the time that you first gave Mr. Kilpatrick and Hanley the notice?

A. Yes, sir.

Q. Verbal notice?

A. Yes, sir.

Mr. Herrington: Do you want these as an exhibit? Do you ask for them? Mark this Exhibit 16.

(Stenographer marks paper Exhibit 16.)

Mr. Fauntleroy: Yes, I would like for them to go in evidence.

Mr. Herrington: Mark this Exhibit 17.

(Stenographer marks paper Exhibit 17.)

Q. Look at Exhibit 16?

163 Mr. Fauntleroy. What's the date of 16?

Witness: February 9th, 1910.

Mr. Fauntleroy: What's the date of that other letter?

Mr. Herrington: April 22nd, 1910.

Q. I will ask you if that's your signature to that?

A. That's my signature, yes, sir.

Q. How did that reach Mr. Kilpatrick?

A. That reached him by delivering it to him in person.

Q. When?

A. Well, I suppose some months ago; I don't know just when?

Q. You don't know when?

A. But there is a reason for it. He wanted to have his memory refreshed in regard to the incident. This is a verbatim copy, or merely a copy, of what I had written concerning the matter. They are simply copies in substance of letters that had been written to him from time to time relative to closing the mill.

Q. Did you tell your attorney?

A. No, sir; Mr. Shaw was our Cripple Creek attorney; I haven't spoken to Mr. —

Q. You say, then, that Exhibit 16 was not sent on or about February 9th?

A. No. It was desired —

Q. Oh, well, now, was it or not?

A. It was not sent by mail, no, sir; I delivered it personally.

Q. On or about February 9th?

164 A. No, I don't think it was on that date.

Q. I will ask you to look at Exhibit 17?

A. That's the same answer that I would apply to the letter, April 22nd.

Q. Was that sent by mail?

A. No, sir, simply a copy of a letter given to Mr. Kilpatrick in substance what had been written.

(By the Court:)

Q. I don't know that I understand. You mean they were copies of something you had written and sent before?

A. In substance, yes sir.

Mr. Fauntleroy: He says Mr. Kilpatrick wanted copies of what he had previously written him, and this gentleman made as nearly as he could copies and gave them to Mr. Kilpatrick.

Mr. Herrington: I don't think the witness said any such thing.

Mr. Fauntleroy: I think that's about the substance.

The Court: The explanation of counsel will be stricken from the record. He may state it over again, if he said that.

Q. When did you write that letter?

A. Well, that was written some time during August, 1910, and they were merely copies of the substance of letters that had been written to Mr. Kilpatrick, to refresh his memory.

Q. Did you —

Mr. Fauntleroy: Let him finish.

165 A. In regard to the matter of the letters that had been written previously.

(By the Court:)

Q. When were they written previously?

A. This one here April 22nd, and the other February 9th, 1910, according to their respective dates.

Q. Where is the contents of these letters? What papers or what books do you have that shows these letters?

A. I never kept copies, books excepting carbon *carbon* copies. I have a carbon copy of more or less every letter.

Q. But you haven't got a copy of these letters that you reproduced?

A. I suppose they may be on hand. Since the fire I have changed my office and the papers have been mislaid.

Q. Where were these letters prepared, these two?

A. They were prepared in St. Louis.

Q. Who did the typewriting? You?

A. No, I believe that was one of my sons in St. Louis. He is now working at the bank.

Q. He did the typewriting?

A. That is at that time he wasn't working.

Q. These letters, Exhibits 16 and 17, were written?

A. At my instance.

Q. In St. Louis?

A. Yes, sir.

Q. In your office?

166 A. In the Gold Issue Mining and Milling Company's office.

Q. And taken from what? Your memory?

A. No, sir, from letters that had been previously written, in substance.

Q. In substance?

A. Yes, sir, because some of the letters were very lengthy and I cut them down to give the concise substance.

Q. Have you got the copies?

A. I don't think so; because since I have moved the office I haven't kept copies of correspondence.

Q. When did you move?

A. Oh, I moved twice since that, from the Equitable Building over to the Mercantile Building, and from the seventh floor to the eighth, and then down to the fifth. Now, it is 505 Mercantile Building.

Q. What was the time of your first move?

A. I can't remember just now, really.

Q. About?

A. The first move? Some time in 1910. The last move I made was to accommodate the Mercantile Company; they had a chance to lease the office. I didn't care to have so much luggage and I got rid of it.

Q. Did you move before or after the fire?

A. I moved after the fire.

Q. Is that all the letters?

A. I have written Mr. Kilpatrick so many letters that I don't know. The last letter I wrote him was from New York. I know that was July 4th.

167 Q. Have you got a copy of that?

A. No, sir; I have got no copies of any of those letters.

Q. You have written Mr. Kilpatrick a great many letters, and these are the only two?

A. No, sir; of course these are the only two, since you hand them to me and I know my signature.

Q. You are quite sure they were written in St. Louis?

A. Yes, sir. To my best knowledge and belief, yes, sir.

Q. Do you know at the time you gave Mr. Kilpatrick these two letters whether you gave him any more or not?

A. I suppose I did.

Q. Don't you know?

A. Yes, sir, I did.

Q. How many more?

A. I couldn't say simply because I wrote him about the mill being shut down every month; I wrote him once every month.

Q. But you haven't preserved any of those letters except what you have by subsequent addition supplied with new letters?

A. Well, it is simply more or less taking the substance. As I said, I moved and I didn't keep the copies of those letters, and I haven't kept none of Kilpatrick's letters to me or to the company.

Q. So you think you wrote three other letters?

A. I suppose, whatever number they were. I wrote Mr. Kilpatrick a letter each period of time concerning the improvements made on the mill and at the mine.

Q. Did you write Mr. Kilpatrick in relation to the mining company?

A. The milling company principally, and then also in relation to the mine, so he would know that the mill couldn't start up until the mining company furnished the ore. I have written him every month from the time the mill shut down.

Mr. Herrington: Mark these Exhibits 18, 19 and 20.

(Stenographer marks the above exhibits as above requested.)

Q. I show you Exhibits 18, 19 and 20?

A. Yes, sir, that's the same; my answer would apply to that the same as to the rest.

Mr. Fauntleroy: Let me see those, will you please.

(Mr. Herrington hands papers to Mr. Fauntleroy.)

At this point Mr. Robertson takes up the cross examination.

Cross-examination by Mr. Robertson:

Q. As I understand, Mr. Depke, you wrote these five letters and handed them to Mr. Kilpatrick all at one time?

A. Yes, sir, all at one time, after the fire.

Q. How soon after the fire was it?

A. I don't remember, sir.

Q. Your son wrote these five letters on the typewriter in St. Louis?

169 A. Yes, sir.

Q. And he made them up from your dictation?

A. He is not a stenographer; I wrote them out myself in pencil.

Q. And gave them to him?

A. Yes, sir.

Q. What did you write them from?

A. From the letters that I had previously written during the respective months as those letters are dated.

Q. Where were you when you wrote the one dated February 9th, 1910?

A. February 19th?

Q. Yes, sir, 1910, where were you?

A. I suppose I was in St. Louis. That's my recollection.

Q. Where were you when you wrote the one April 22nd, 1910?

A. All those dates I was in St. Louis.

Q. The one written on May 30th, 1910?

A. Yes, sir.

Q. July 1st, 1910?

A. Yes, sir.

Q. And July 29th, 1910?

A. Yes, sir.

Q. Now, when you wrote those letters you were in St. Louis, all of them?

A. Yes, sir, those respective dates.

Q. When you got your son to write them you wrote them out with a pencil and handed them to your son?

A. From the substance of letters which had been written.

170 Q. Why didn't you have those letters copied literally that you had there in your possession?

A. Simply, they pertained to some other matters Mr. Kilpatrick had written me about in requesting me to send him some payment on the premiums.

Q. What difference did that make?

A. It was simply because——

Q. Why did you want to leave that out?

A. Simply to make it short. All I desired was to accommodate Kilpatrick with the substance of the letters.

Q. Did you make that pencil copy and give it all to your son at once?

A. I suppose, so, yes, sir.

Q. At what time after the fire was that?

A. I don't know; it may have been the 20th or 25th of August, or it may have been September; I don't remember exactly.

Q. You don't remember?

A. No, sir.

Q. So, then, in order to supply some letters that Mr. Kilpatrick wanted you had these letters written which you wrote in pencil for your son to copy?

A. Yes, sir, in substance.

Q. And those letters in substance were taken from other letters that had been written?

A. Yes, sir.

Q. Why, did you want Mr. Kilpatrick to have these letters?

A. Simply to assist him inasmuch as he didn't keep copies; he told me he didn't keep the copies, and I supplied them.

171 Q. Now, those were carbon copies which you had there, weren't they, that you took these from?

A. They were duplicate copies.

Q. What you call carbon copies?

A. Yes, sir.

Q. The original is made and a piece of carbon is put down between and that would show just exactly what the original showed?

A. The same, exactly.

Q. That would show what the original showed. In other words, a carbon copy is an exact copy of the original?

A. Of the ones you have there.

Q. You didn't answer the question. A carbon copy is an exact duplicate of the original, isn't it?

A. Yes, sir.

Q. A carbon copy always shows itself that it is a carbon copy?

A. Well, I tell you——

Q. (Interrupting.) The letters——

Mr. Fauntleroy (interrupting): Just one moment.

Q. Well, I withdraw that question: The letters of carbon copies is not made so distinct as top copies?

A. I want to say in connection: I generally make two copies with the carbon.

Q. So when you said they were copies, carbon copies, you were mistaken?

A. As far as the original letters that I referred to.

Q. So, then, the original letters which you made your
172 pencil memoranda from for your son to copy were not taken
from carbon copies?

A. They were taken from duplicates. This is merely in substance.

Q. I am asking you about those others you took these from: Those others were not carbon copies that you took them from?

A. I can't say they were.

Q. In other words, when you wrote letters to Mr. Kilpatrick, you made two copies?

A. At times I would write it with a pencil and copy the original.

Q. How was it in this case?

A. I can't remember.

Q. You said a while ago they were carbon copies. You were mistaken?

A. There were two copies made. I can't say they were carbon copies, but they were copies.

Q. Can you say they weren't?

A. They were not carbon copies.

Q. What kind of copies did you have before you when you wrote these letters?

A. May have been pencil.

Q. What's your recollection?

A. I suppose it was pencil.

Q. You said when you furnished copies for your son to write you didn't make exact copies of the letters you had?

A. No, sir; they were lengthy, and I didn't want to encumber them with other matters.

173 Q. But they always related to insurance?

A. In reference to the improvements that were being made at the mine and mill.

Q. Where are those copies you took these from?

A. As I stated, I moved two or three times since the fire and they may have been destroyed in the moving.

Q. You moved two or three times?

A. Yes, sir.

Q. This fire occurred the 13th of August, 1910?

A. Yes, sir.

Q. When was the first time you moved after that?

A. I don't remember, really; in that regard I can't answer that question conscientiously. This last move I moved about three months ago.

Q. Where did you move from?

A. From one floor to the other, to another one, in the Mercantile Building, St. Louis.

Q. Where did you move the second time?

A. I don't remember that. The last time was to accommodate the building company. I don't remember the date.

Q. When did you move the third time?

A. The third time? Let's see. I suppose that may have been about three months ago, possibly.

Q. So, then from about two or three months after the fire occurred up to two or three months ago you moved three times?

A. From the time of the fire I moved three times.

Q. What did you keep your papers in?

A. Letter files.

174 Q. Where are they?

A. I don't know.

Q. Haven't you got those letter files?

A. No, sir.

Q. The same cases that you had them in before?

A. I had so much luggage in the office that I can't remember of them.

Q. You knew you had such matters, and which Mr. Kilpatrick told you he didn't save copies of?

A. I would now.

Q. Just answer the question?

A. State it again.

Q. You knew you had copies of letters there in your possession concerning this matter?

A. Yes, sir.

Q. This insurance, that Mr. Kilpatrick said he had no copies of?

A. Yes, sir.

Q. And you thought it was better to make copies of those letters instead of preserving the original copies?

A. I told him I could give him the substance of those letters.

Q. Why didn't you get out the original letters and show them to him?

A. Simply because it pertained to a demand on me personally requesting me to favor him with a remittance, and I didn't think it was necessary to include that.

Q. You didn't care to display that fact. You have already brought one letter from Kilpatrick demanding that money?

175 A. That was simply because it related to the chattel mortgage.

Q. Did you ever give those copies you retained down there to your attorneys?

A. Yes, sir.

Q. The ones you made these from?

A. Yes, sir, I gave it to Mr. Shaw.

Q. What did he do with it?

A. I don't know, of course; we changed the case from Colorado to Missouri.

Q. Brought the suit in Colorado?

A. Yes, sir.

Q. When?

A. About December.

Q. December, 1909?

A. Yes, sir.

Q. Was that before or after you made these copies?

A. We brought the suit after, I believe.

Q. After you made those copies and gave them to Mr. Kilpatrick.

A. I believe it was; anyway we complied with the policy.

Q. Anyhow, you knew all the time the companies were refusing to pay this insurance because you failed to comply with that "watchman's clause"? They gave you that reason at first?

A. The agent never gave any reason.

Q. Didn't you understand, didn't they refuse all the time to pay you that insurance?

A. That is, since that fire?

176 Q. Yes, sir.

A. I don't remember what their complaint was to the attorney.

Q. That was—

Objection by Mr. Fauntleroy (interrupting): You are substantially cutting across him.

The Court: If there is anything further proceed.

Mr. Robertson: He brings in this noise.

Mr. Fauntleroy: It is not quite as loud as your noise.

Q. You knew they were refusing to pay this policy on account of your failure to comply with that "watchman's clause," didn't you?

A. I can't say I do.

Q. Well, you knew these policies were in controversy?

A. I do.

Q. And you didn't preserve those letters which you said the original is in your hand, which you sent to Mr. Kilpatrick?

A. Simply, he was not insistent about the fact.

Q. I asked you a question which you can answer by yes or no.

A. No, I have got to answer your question in my way.

Q. Well, I say, notwithstanding your controversy with the insurance company you lost those letters?

A. Yes, sir.

Q. Now, how much furniture did you have in the first office you had, the first one you moved from?

177 A. Well, I had an office full, if you want to know it; had a safe and three desks.

Q. Where did you keep your letter files?

- A. Simply on the desk.
Q. Did you move your letter files?
A. I moved them away and some times sold them as rubbish.
Q. So, in all probability, you sold those letters as rubbish?
A. Yes, sir, and books, too.
Q. Book, too?
A. Yes, sir.
Q. You saved the chattel mortgage?
A. Sir?
Q. You saved the chattel mortgage?
A. Yes, I turned that over to the attorney.
Q. When did you turn it over to the attorneys?
A. Which? The chattel mortgage?
Q. Yes, sir.
A. When the suit was filed.
Q. Where? In Colorado?
A. Colorado.
Q. Now, when did you turn that deed that you introduced in evidence over to the attorneys?
A. About the same time.
Q. When did you turn those two letters over of Mr. Kilpatrick's?
A. The same time.
Q. But it didn't occur to you to turn those letters over?
178 A. It was immaterial.
Q. Why, was it immaterial?
A. Simply because my object in sending him copies of those letters was to let him know inasmuch as the letters had been lost, I would supply the substance.
Q. I know, but why didn't you keep the very best evidence, which, was the original copies; you, are lawyer enough to know they are the best evidence?
A. I wanted to give the substance; I didn't think they would be used on our side; on your side.
Q. Didn't you send it to Mr. Kilpatrick in order that you might have it on him?
A. No, sir, Mr. Kilpatrick is my friend and I wouldn't have done it.
Q. Why, did he say he wanted the letters?
A. He desired the letters at the time because of the fact he didn't keep the original.
Q. What difference would that make, if he was your friend?

Objection by Mr. Fauntleroy: That's argumentative; object to it.

The Court: It seems so.

To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

Q. What did he say on that subject, if these letters were not to be in controversy.

A. Simply that he would like to know what the substance of those letters were, and inasmuch as I had the recollection I would 179 give him a verbatim or nearly a verbatim, copy of the letters

that were written at the respective dates that correspond to those letters you have in your hand.

Q. You know Joseph Peters, don't you?

A. Yes, sir.

Q. He is not here, is he?

A. No, sir.

Q. Where does he live?

A. In Florissant, Missouri.

Q. In St. Louis County?

A. Yes, sir.

Q. Didn't Mr. Kilpatrick tell you that if the company found out that you were idle up there for more than thirty days that they would cancel all those policies?

A. Never did, sir; Mr. Kilpatrick never did.

Q. Didn't he tell you that if the companies found out that that chattel mortgage was on part of that property they would cancel?

A. Never did; never said a word about anything of the kind.

Q. Well, you knew that for yourself?

Objection by Mr. Fauntleroy: That's argumentative.

The Court: He may answer.

A. What's the question?

Mr. Robertson: Read the question.

(Stenographer reads the last question.)

A. What does that pertain to.

Q. That pertains to your knowledge of the conditions of the policy that the chattel mortgage made it void?

180 A. I simply left the matter entirely with Mr. Kilpatrick.

Q. When did you first hear of this cancellation of the Northern policy?

A. July 11th, I believe, 1910.

Q. That's when he wrote the other one?

A. Yes, sir.

Q. And did you ever say anything to him about it afterwards?

A. About the cancellation of the Northern policy?

Q. Yes, sir.

A. I don't remember.

Q. Where were you when you received that notice?

A. St. Louis.

Q. How soon did you see him after that?

A. Well, I was in Cripple Creek some times twice a month, and then again once a month. Invariably, always there once a month, and I would invariably call on Kilpatrick.

Q. What was said between you and him about that policy at that time when you first saw him after that receipt of that notice in St. Louis?

A. He didn't say any more than he did in his letter.

Q. He said if the companies found it out they would all cancel?

A. Yes, sir.

Q. He said that out there?

A. Yes, sir.

Q. So, then you knew he was holding that fact from the companies?

181 A. I don't know.

Q. You knew that from that conversation he was withholding it, didn't you?

A. I can't say.

Q. You inferred that?

A. I could infer from his remarks that he was looking after the business of the company.

Q. And you inferred, also, that he wasn't informing the companies, didn't you?

A. No, sir.

Q. You said a moment ago that he said to you if the other companies found it out they would cancel?

A. He didn't say anything more than what he said in that letter.

Q. I know, but he said—

Objected by Mr. Fauntleroy (interrupting): There is no allegation of a conspiracy between this agent and this defendant. The fact is, these men, Kilpatrick and Hanley, they were the company out there. The company was in Pennsylvania. They had authority to cancel the policies and take them up. They were the only ones representing the company. Now, argumentatively to place on the witness a conspiracy between him and the company, I say, is immaterial: There is no allegation here and no defense of any conspiracy between this man and the company and their agent.

The Court: I take it that the conversation between these parties having been gone into by the plaintiff, may be gone into by the defendant.

Mr. Fauntleroy: I have no objection to that, but the argumentative assertion that's being tried to be drawn that he said if the companies knew it, and so forth: Kilpatrick was the company. They were the ones and the only ones that were the company.

The Court: The inquiry is relating to the conversation.

Mr. Fauntleroy: What I am objecting to is what is his argumentative line of what he knew the company would do.

The Court: I don't think the objection applies to the last question.

Mr. Fauntleroy: To that particular question I object because for the reason the companies knew all about it with their general agents there. Kilpatrick would cancel Northern policies instantaneously of his own volition.

Mr. Robertson: You are mistaken about that.

The Court: He may state what was said.

Q. You said that, didn't you?

A. He said that?

Q. Just answer the question yes or no. Did you say that?

A. Not in the manner that he wrote the letter, I can't say yes or no.

Q. What did he say to you about the companies cancelling it if they found it out?

A. I have no positive recollection, because I left the insurance

matter with Mr. Kilpatrick entirely, whom I recognized as an honorable insurance agent.

Q. You didn't think he would withhold the information from the company?

183 A. No, sir, I had no knowledge of that.

Q. You thought he would tell the company?

A. I thought he was honorable.

Q. Didn't he tell you this: You knew that you owed him at that time?

A. The company?

Q. Yes.

A. Yes, sir.

Q. You knew that he had advanced those premiums, did you?

A. I don't know that positively.

Q. Didn't he tell you that?

A. He may have told me.

Q. So then when he told you that you knew that you owed him personally?

A. I didn't owe him personally, no, sir; it was the company owed him.

Q. Well, that's your conclusion.

Mr. Fauntleroy: Well, I object to that remark.

The Court: Objection sustained.

To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

Q. I mean by that I am satisfied with your answer. When did you make that chattel mortgage?

A. Which one?

Q. The one to Mr. Peters?

A. June 10th, 1910.

Q. June 10th, 1910?

A. Oh, beg your pardon. It was issued October 22nd, 1909.

184 Q. October 22nd?

A. Yes, sir.

Q. 1909?

A. Yes, sir.

Q. You made a statement about this policy on November 22nd, 1909, didn't you; on the 11th day of November, 1909, didn't you?

A. Which policy?

Q. Didn't you make a statement about that mortgage on the 11th day of October, 1909? 11th day of November, 1909?

A. To whom?

Q. To Kilpatrick and Hanley, agent?

A. I don't remember.

Q. Didn't you make a statement on the 11th day of November, 1909, and tell them in writing that there was no chattel mortgage against it?

A. No, sir; I don't remember that.

Q. Is that your signature there? (Holding paper to witness.)

A. Yes, sir.

Q. Look over that and see if you didn't tell them?

A. The chattel mortgage was on the roaster and cooler, and not the mill. Mr. Peters had loaned for the construction of the roaster and tram way twenty-five thousand dollars, and that was given on that, and not on the mill. The roaster is not insured.

Mr. Fauntleroy: Get your policy and you will see the roaster was not insured.

Q. Isn't the mortgage and insurance on the Chilean mill?
185 A. That's the only piece of machinery that's on the Chilean mill. He didn't ask for that chattel mortgage either. It was voluntary on my part.

Q. Now, just look at this. See if this question isn't there: "Is there a mortgage on any of the property"? and if you didn't answer "no."

A. There was no mortgage on any of the property insured.

Q. You answered that, didn't you?

A. I answered because it didn't apply to the policy; it didn't apply to any insurance.

Mr. Robertson: Where is that mortgage?

Mr. Fauntleroy: It is over there

Q. First question asked you here is "name of president and officers"; "J. F. W. Depke, president and general manager." "When was company organized?"; "Three years ago." "When was plant built and machinery installed?"; "Recently." "Is there any mortgage on any of the property?" "No, sir." Wasn't this mortgage on machinery located in the cyanide mill, Chipple Creek, Colorado: "One Edwards Duplex Roasting furnace, one Edwards Cooler and ten horse-power electric motor with building, one Evansville Wadell Chilean mill"? Wasn't the insurance on property that's included in that mortgage?

A. That Chilean mill, or the fine grinding machine was included in the chattel mortgage which was given to Mr. Peters, but I desire to say that the Wells Investment Company owned the roaster and the cooler, and therefore, you see, I could not include the roaster and cooler in the insurance.

186 Q. Why didn't you say, when you was asked if there was mortgage on any of the property, instead of "none," why didn't you say "yes, on the following property"?

A. Well, because the Chilean mill is a trifling matter.

Q. You had insurance on the Chilean mill?

A. It was at the main building.

Q. You had a chattel mortgage on the Chilean mill and on the building?

A. No, sir.

Q. Don't that show it?

A. Not on the building. It was on the roaster, roaster building and cooler.

Q. But, then, the fact is, you see now, from an examination of those chattel mortgages and policies that chattel mortgage was on some of the insured property?

A. That fine grinding machine was included in that chattel mortgage.

Q. And it had insurance on it, didn't it?

A. I wouldn't consider it in that light.

Q. Not what you consider, but what you told them there was no chattel mortgage, then you was wrong?

A. In regard to that, I didn't consider the item worth mentioning because the principal property was the roaster and cooler.

Q. Mark this Exhibit 21, Mr. Stenographer.

(Stenographer marks paper Exhibit 21 as requested.)

Mr. Fauntleroy: What is that exhibit, Mr. Robertson?

187 Mr. Robertson: Exhibit Number 21.

The Witness: What's the date of it, Mr. Robertson?

Mr. Robertson: The date of it is November 11th, 1909. There is another branch of the case that we want to examine him on but we are not prepared to do it now, because we are expecting some information.

Cross-examination continued by Mr. Herrington:

Q. Mr. Depke, I will ask you—

Mr. Fauntleroy: Well, have you got your health back so you can cross examine?

Mr. Herrington: Well, I will put it to Mr. Robertson.

Mr. Fauntleroy: Go ahead, but you seem to be taking shots at him. First, you get sick and then get well and take it up.

Cross-examination continued by Mr. Robertson:

Q. What was it that was not destroyed that was included in this policy?

A. The roaster was not destroyed. The building was destroyed; absolutely the entire milling plant wasn't destroyed.

Q. The office and laboratory were not destroyed?

A. No, sir.

Q. So, then, the item of a hundred and fifty dollars, five hundred and fifty dollars, that were not destroyed?

A. Not destroyed. The wind was blowing from the opposite direction.

188 Redirect examination by Mr. Fauntleroy:

Q. Mr. Robertson has read you from this letter July 21st, written you by Kilpatrick and Hanley, saying that they had notified you the other companies would cancel if they knew of this mortgage. I will read what's said from this letter of July 21st, Exhibit 7: "Dear sir, yours with policy enclosed was duly received today for which we thank you"—that was the Northern policy you sent to be canceled?

A. Yes, sir.

Q. Who canceled those policies?

A. Kilpatrick and Hanley.

Q. (Reading:) "The cancellation of this policy was occasioned by the filing of that chattel mortgage by Mr. Peters, and the rest of the companies may follow suit as when one starts they generally

all go." They never told you they would cancel it if they knew of it, did they?

A. No, sir.

Q. All you knew——

Mr. Robertson (interrupting): We object to his leading and suggesting the form of the question.

The Court: Don't lead the witness. Ask the question.

Q. Did they ever notify you, or did you ever know, or suppose——

Mr. Robertson: Well, we object.

Q. Wait until the question is asked. Did you know or suppose, or did they inform you that they would cancel by reason of this Peters mortgage in the other policies?

189 A. No, sir.

Mr. Robertson: Don't answer that question. I object to the question as leading and suggestive, and contains in it a supposition of some kind.

The Court: I think it would be better to ask your questions one at a time.

Q. All right, I will come at it that way. Did you think from this letter that it was notice to you that the companies would cancel if they knew of that mortgage?

A. No, sir.

Objection by Mr. Herrington.

The Court: That grows out of the cross examination.

Q. Did you have any information that they didn't know of that mortgage; the agents, Hanley and Kilpatrick knew of it?

A. That is, in reference to that date?

Q. No, at any time. The companies? Of this Peters mortgage?

A. I don't know; he had knowledge.

Q. Did you have any dealings or transactions with this company at all except through Kilpatrick and Hanley?

A. No, sir.

Q. You never saw any other officers or agents?

A. No, sir.

Mr. Fauntleroy: That's all.

Mr. Robertson: We don't care to further cross examine him.

190 FRANK DEPK, being duly sworn, testified as follows, to-wit:

Direct examination by Mr. Fauntleroy:

Q. What is your name?

A. Frank D. Depke.

Q. You are a son of the gentleman who just left the stand?

A. Yes, sir.

Q. How old are you?

A. Twenty-two.

Q. What has been your business the last four or five years?

A. Mining and milling.

Q. Where?

A. Cripple Creek.

Q. Were you in charge of this plant in controversy here?

A. I had charge of the assay and roller department.

Q. What experience have you had out there? How long have you been connected with them in charge of the ore and assay department?

A. I have been there with them three years.

Q. And what position were you occupying there?

A. I was doing the assaying and had charge of the ore department.

Q. Can't you talk louder?

A. Yes, sir.

The Court: Speak up louder.

191 Q. State to the jury what experience you had had in ores and in smelting during these four or five years you were in charge of this plant?

A. Well, I had practical as well as theoretical knowledge of it.

Q. Where did you get your theoretical knowledge?

A. From the reading of books.

Q. Practical? You had been there right along?

A. Yes, sir; well, I had taken a term of that before, from other practical men.

Q. Were you there when it burned?

A. Yes, sir.

Q. How was it set on fire?

A. By lightning.

Q. Where were you?

A. Cripple Creek.

Q. How far was that away?

A. Two miles.

Q. Did you see the flash of lightning that struck it?

A. Yes, sir.

Q. Describe the flash to the jury?

A. It was very vivid and lit up the whole sky, and the sky was sort of over-cast with clouds. It was one of the brightest I have ever seen.

Q. What's the elevation where this plant was?

A. I can't tell you exactly.

Q. About how high?

A. 9800 feet.

Q. Well, what did you do when it was struck?

A. I went up to the livery barn and got a team and prepared to go out.

192 Q. What did you find when you got there?

A. The whole plant was in flames.

Q. Who was directly in charge of that plant at the time it was struck?

- A. I had charge of it then.
Q. Was any of your workmen there?
A. We had a watch there.
Q. Was that watchman there right along?
A. Yes, sir; he lived there.
Q. What was the duty of that watchman?
A. To watch the place; keep everything under his eye.
Q. You hired him for that purpose?
A. Yes, sir.
Q. How long had that watchman been there as a watchman?
A. Two months and a little over.
Q. Wasn't it a little over three months?
A. A little over two months.
Q. What watchman did you have there when he wasn't there?
A. We had one before there.
Q. I see. So you had a watchman there right along?
A. Yes, sir.
Q. He was at the plant when it was struck?
A. Yes, sir.

Q. State to the jury when you got there what did you find?
A. I found the whole plant in flames and could do nothing
193 with it. Couldn't get within a hundred feet of it on account
of the heat.

Q. What became of it?
A. Just literally destroyed everything, and nothing left but a
mass of iron.

Q. Describe to the jury how big that building was? Give a general
description of the building and machinery and what was ins-
ured?

A. There were the ore bins at the upper part of the hill, and
farther down was the crusher and roller, and then comes the tanks
and the Chilean mill, and boilers and various tanks, and the filter
place, and some tanks still farther down the hill. These were all
covered over by corrugated roofs, and wood sides.

Q. So it was all under the insured building?
A. Yes, sir.
Q. How big was that building?
A. You mean in width and height?
Q. Yes, sir.
A. It was in all sorts of rectangles.

Q. They were in area how large with reference to this whole court
house building would be, the real expansion of it?

A. Oh, parts of it were twice as high as this room, and the length
it would be three times this room and more; four times.

Q. Here. I have some photographs. State whether or not that's
a photograph of it?

A. Yes, sir; that was before it was completed.
Q. Is that a fair representation of it?
194 A. Yes, sir; it is.

Mr. Fauntleroy: Mark this Exhibit 22.

(Stenographer marks the above photograph as requested.)

Mr. Fauntleroy: I now offer in evidence Exhibit 22, this photograph.

There being no objection, the above photograph, Exhibit 22, is admitted in evidence and is shown to the jury.

Q. What was the actual cash value of that plant and the insured property at the time of the fire?

A. A hundred and thirty-five thousand dollars.

Q. Your experience is such that you know what the values were?

A. Certainly; from the machinery and the cost.

Q. In this answer, they charge—did you occupy any official position with the company?

A. Not officially.

Q. What was your position?

A. As assayer and the ore department, although I had access to the whole mill.

Q. How much gold was there in process at the time of that fire?

A. At least fourteen thousand dollars.

Q. What became of it?

A. Destroyed; disappeared after the fire.

Q. Everything was totally destroyed?

A. Everything.

Q. You say there were at least fourteen thousand dollars in gold there in process, which is mentioned in this policy? How do you know that?

195 A. Because I was doing the assaying. I know the ore that went in and its value. That was my business at that time.

Q. Were you there daily?

A. Yes, sir.

Q. Had you been there the day of the fire?

A. No, sir.

Q. How long before had you been there?

A. That I can't say exactly.

Q. Well, you say you had been there daily?

A. That was when the mill was running.

Q. Well, how long before the fire had you seen the ores there?

A. Shortly before.

Q. How shortly before?

A. I can't say exactly. A week.

Q. How was that gold kept?

A. I don't quite understand.

Q. How was it housed so as to keep it from being stolen?

A. Why, we had Yale locks on all the doors.

Q. Was it locked up?

A. Yes, sir; it was.

Q. And you say that everything was destroyed?

A. Yes, sir.

Q. And the amount of the loss was a hundred and thirty-four thousand dollars?

A. Yes, sir.

Cross-examination by Mr. Robertson:

Q. What time did the mill shut down before this fire?
196 A. What time did it shut down?

Q. Yes, sir.
A. January 10th, 1910.
Q. There wasn't anything doing up there after that?
A. Well, there was nothing in the milling operations, no.
Q. Why was that gold in process up there? What was it doing there?

A. Simply because it couldn't be extracted at that time.
Q. Why?
A. Because it was in the process.

Q. How much heat was it subjected to when the mill was in operation?

A. How much what?
Q. How much heat was it subjected to? How much heat would that be?

A. I don't quite see what you are driving at.
Q. Well, you have a fire there?
A. Have a roaster.
Q. Had any of this gold in process, as you call it, reached the roaster yet?

A. Oh, yes, there was quite a bit went through.
Q. And how much heat was it subjected to in the roaster?
A. The heat varies as the grade of ore.
Q. I know. The kind of ore you had there at that time?

A. We had refractory ore.
197 Q. What would be the heat in degrees?
A. It varies on the ore. If it has more sulphur it needs more heat.

Q. The ore you had at that time, I am talking of?
A. We had quite a quantity.
Q. What kind was it?
A. Gold ore.
Q. How much heat was it already subjected to?
A. It is hard to say.

Q. It had already got into the roaster. What would that be? How many degrees Fahrenheit?

A. You can get it mostly any heat.
Q. You are an assayer. Can't you tell us how hot it would get it there?

A. You mean the greatest heat. Its greatest heat?
Q. Yes.
A. 1500.
Q. 1500 and then it would go down how much below that?
A. Down to six hundred; that is, for doing the roasting results.
Q. How would you get that heat?
A. By oil burners.
Q. Well, now, that's hotter than any wood and other material that was burned there would make it, wouldn't it?

A. What?

Q. That's hotter than this conflagration of the building would make it, wouldn't it?

A. Yes. Sure.

198 Q. If that other heat didn't destroy the ore why did this destroy it?

A. It don't destroy the ore exactly. It has been disappeared down the hill since the fire.

Q. Well—

Mr. Fauntleroy: Let him answer.

A. I say you can't keep ore on the side of the hill after it is exposed to the weather.

Q. Why couldn't you gather it up after the fire?

A. You couldn't do that. The values would be washed away. You take these slimes and get heat to them and it makes a dust out of it.

Q. What was to prevent you from picking it up the next day?

A. You couldn't do it after fire on account of the machinery.

Q. How much bulk would this gold in process amount to?

Q. That's scattered all over the mills.

Q. But where do you keep this gold in process?

A. It is all through the mill.

Q. You don't mean scattered on the ground?

A. No, it is in the machinery.

Q. What piece of machinery would it be in?

A. All of it.

Q. How big a space would it occupy?

A. The whole mill.

Q. The machine don't occupy the whole mill?

A. That's the mill.

Q. What I want to get at is, why you couldn't gather up this gold in process after the fire?

199 A. You couldn't do it.

(By the Court:)

Q. Why not? Tell why?

Q. That's what I want to know.

A. Well, as I stated before, this gold in process—it would just be taken, blowing away, you know; the dust slimes.

Q. It hadn't blown away the next morning, had it?

A. We had an awful storm there.

Q. Had nothing to blow it away before the next morning?

A. Oh, yes, we had quite a storm there.

Q. You tell us that the gold in process blew and scattered around all over the country?

A. I don't know where it went.

Q. You didn't look for it?

A. No, I didn't. It disappeared.

Q. When did you have what you call the "last clean-up" before the fire?

A. I can't answer that, the exact date.

- Q. Well, about? You was assayer there?
A. Yes, sir.
Q. You wouldn't know about a thing like that?
A. I wouldn't remember the exact date.
Q. About the exact date?
A. November.
Q. What day?
A. The first part of November.
Q. And you closed down on January 10th?

A. Yes, sir.
200 Q. In the last clean-up there, in November, where did you ship our product to?

- A. That I didn't have charge of.
Q. You don't know?
A. No, sir.
Q. Who does know about that?
A. I suppose my father does.
Q. Now, tell us what you mean by clean-up?
A. Clean-up is the gathering of the slimes and the decomposition of the zinc after the solution passes over them in the boxes, and treated with chemicals, and got it down to a bullion.

Q. How long had it been before you had clean-up before that?
A. That was the first time.
Q. How long had you been working before you got that clean-up?
A. Two months; two and a half months.
Q. Now, when you had that clean-up there in November, after you had been running two months and a half, what were the returns of it?
A. That I wouldn't know.
Q. Who does know?
A. I suppose my father does.
Q. Was he there when you had that clean-up?
A. I don't recollect who took the contents.
Q. And you don't know where it was shipped to?
A. No, sir.
Q. So, then, you worked from November then until January 10th without any other clean-up?

201 A. I think we—I am not positive, but we collected it from bins there.

- Q. What do you mean?
A. The concentrates, what we took off the blankets.
Q. When was it you took those off the blankets?
A. I don't remember those dates.
Q. I know, but how long was it before you shut down on the 10th of January?
A. It was a month before, at least.
Q. So, then, you had a clean-up and you gathered up the concentrates after that?
A. After the first one.
Q. Yes.

A. Yes.

Q. Then what did you have left in there?

A. We still had the ore in process, still, that we hadn't cleaned up in the zinc boxes. There was lots of ore in process yet.

Q. Did you keep any account of what quantity you had in there?

A. I know the quantity that went through the mill from the beginning to the end.

Q. But I am talking about after the clean-up?

A. Which clean-up?

Q. I mean the last clean-up, and before you shut down, how much did you have in there?

A. We run through over one thousand tons.

Q. What per cent of that was gold?

A. You mean what to the average?

Q. Yes.

202 A. It averaged five dollars and a half.

Q. Five dollars and a half a ton?

A. Yes, sir.

Q. You had how many tons?

A. Had a thousand.

Q. It would average five dollars and a half a ton?

A. Yes, sir.

Q. You supposed then that it would be about a thousand tons in there in process at the time of this fire?

A. No; no, sir; still some that was left before from the others.

Q. How much was left before?

A. You would have to figure that out.

Q. You don't know?

A. Certainly. You can figure that out.

Q. Did you have anybody arrested there a short while before the fire?

A. No, sir; I didn't.

Q. Were you a witness in a case in the State of Colorado, against somebody?

A. Yes, sir.

Q. Who was it?

A. Who was arrested?

Q. Yes, sir.

A. A party by the name of John Hunt.

Q. When was he arrested?

A. I don't remember.

Q. Well, how long after the clean-up was he arrested?

203 A. That was about May, 1910.

Q. May, 1910, and after you had closed down?

A. After we had closed down.

Q. What was he arrested for?

A. He was supposed to have stolen some values there.

Q. Some of the gold in process, wasn't it?

A. Some of the gold.

Q. Was you a witness in that case?

A. Yes, sir.

Q. Did you testify?

A. No, they had me up there about this matter and they found I wasn't needed.

Q. You was a witness?

A. Yes, sir.

Q. How much did you testify had been taken out of there? How much gold in process had been taken out?

A. I didn't testify that.

Q. Well, how much did you tell the officer was taken out and was missing?

A. I didn't tell him anything.

Q. Well, how much had been taken out and was missing?

A. There hadn't been taken over a hundred dollars.

Redirect examination by Mr. Fauntleroy:

Q. I will ask you whether or not that gold in process is such that it would be washed away by rains?

A. Sure.

204 Q. And that whole building was totally destroyed?

A. Yes, sir.

Q. Was there any rain that night in this storm?

A. After the fire?

Q. Yes.

A. No.

Q. Was there any during the fire?

A. Not while I was out there, no.

Q. But it is of such a character that it disappears?

A. It disappears.

Q. And you are able to tell the jury of your own knowledge that that gold did disappear in that fire?

A. Yes, sir; you can't find anything there.

Q. And everything in it was totally destroyed?

A. Yes, sir.

Cross-examination by Mr. Robertson:

Q. Now, when you are talking about the value of that ore, are you talking about the value of it in rock, or value after it is treated?

A. The value that's in the rock.

Q. So it has to be treated after that?

A. It is treated, certainly. I take the assay from the rock and the rock is treated the same way after I got it.

Q. Was the ore in process in the rock?

A. Some was in the rock.

Q. How much was in the rock?

A. That was scattered through the machinery, and you couldn't specify that.

205 Q. How many tons of the rock was scattered through the machinery?

A. Quite a number of tanks; I couldn't figure that up right now; so many tanks I can't recall.

NAT THORPE, being duly sworn, testified as follows, to-wit:

Direct examination by Mr. Fauntleroy:

- Q. Your name, please?
- A. Nat Thorpe.
- Q. Where do you live?
- A. Denver, Colorado.
- Q. How old a man are you?
- A. Fifty-two.
- Q. And what has been your business?
- A. At present?
- Q. No. What has been your business?
- A. At what time? At present?
- Q. No.
- A. At present I am working at the furniture store.
- Q. You have been in the hospital, haven't you, lately, a sick man?
- A. Yes, sir.
- Q. Were you the watchman for this Gold Issue Mining and Milling Company, August 13th, 1910?
- A. Yes, sir.
- Q. How long had you been watchman there at this mill? I will show you Exhibit No. 22, and ask you whether or not that's a picture of the mill?
- A. Yes, sir.
- Q. That's the mill that you were watching at?
- A. Yes, sir.
- Q. Were you there August 13th when it burned?
- A. Yes, sir.
- Q. Tell the jury where you were standing and what happened with reference to the mill?
- A. I was standing about, oh, twelve feet, I should think.
- Q. From what?
- A. From the mill.
- Q. Well, what happened?
- A. It was stormy, lightning, flashing and thundering, and a tremendous shock broke through the clouds; it was a very severe shock, and it caused me to look around and see if it struck. I heard the breaking of the timber and the cracking.
- Q. Was there a flash of lightning?
- A. Yes, sir. I went around the building, which took, I suppose, five or ten minutes, and looking up I saw smoke coming up, and then light, flames and then I thought I would go in, but I thought if I opened the door it would cause more draft, so I took the bucket climbed up over the roof and dashed the water against it, and coming down I slipped. It was raining and the roof was very slippery and I fell down.
- Q. You say it had been raining?
- A. Yes, sir; raining, thundering and storming, and I was a little stunned from the fall, and I didn't feel like making it again so I got my gun and got about fifteen feet away and fired six or seven shots to call the attention.

- 207 Q. What became of the building?
A. It burned up.
Q. What became of the machinery and things in it?
A. They were destroyed.
Q. Everything destroyed?
A. Yes, sir.
Q. State what quantity of ores in process, and ores were in that building at the time of the fire? Not in dollars and cents, but in quantity?
A. In the bins?
Q. Yes.
A. Quite a considerable lot of ore.
Q. And in process?
A. Quite a lot through the different machinery.
Q. State whether or not the mill's capacity was pretty well taxed?
Mr. Robertson: We object to the leading and suggestive form.
The Court: Don't lead the witness.
Q. State with reference to the capacity of the mill what quantity was in there?
A. I couldn't say.
Q. You are not a scientific man with ores?
A. No, sir.
Q. Sir.
A. No, sir.
Q. How long had you been watching there?
Q. I had been watching eleven days.
208 Q. Nobody had taken anything out of that mill up to the time of the fire, had they?
A. No, sir.

Cross-examination by Mr. Herrington:

- Q. You were not a witness in this case against—Henry, was it?
A. No, sir.
Q. For the larceny of the ore?
A. No, sir.
Q. They were arrested before you went there, were they?
A. Yes, sir.

J. F. W. DEPK, being recalled, testified as follows, to-wit:

Direct examination by Mr. Fauntleroy:

- Q. Do you know how much ore in process, and ore that was insured was in that mill at the time of the fire?
A. Yes, sir.
Q. How much?
A. Fourteen thousand dollars.
Q. Tell the jury how you come at that?
A. The Midget Company, of which I was an officer, provided the mill with the necessary milling ore. During the months of October, September, October, November, December, 1909, and January, 1910,

the Midget Mine sold the Gold Issue Mill 3300 tons of ore at an average value of five dollars and a half per ton. We made a clean-up which means in the shape of gold bars, aggregating twenty-
209 five hundred dollars, which left a net remaining amount of fourteen thousand in the milling plant in this wise: Our ore bin—we had four ore bins; the total capacity of the four bins was one thousand tons. In December, the Midget Company made a strike, and they had occasion to send very good high grade ore to the mill. We had, possibly, six hundred tons in the bins from the Bonanza Mine, of which I was present, and which averaged seven dollars and a half per ton. The Midget Company sold for forty-five hundred dollars; ninety-five hundred dollars, the remaining of the fourteen thousand dollars, was distributed in the crushing department (the dust covered about two inches thick) and in the transmitting department, the roaster, the cooler, and then the amalgam where the very rich ore was kept, and which is locked; nobody has access to it, except myself and the superintendent.

Q. Who is he?

A. Mr. Obrien. I suppose he is in Australia. And we have the sands and the precipitates, which is the gold in the solution, precipitates in the zinc. Now, gentlemen, there was ninety-five hundred dollars in the entire remaining plant in process of manufacture; forty-five hundred dollars in the ore bins which made it fourteen thousand dollars.

Q. You only made a claim of nine thousand dollars in your proof of loss, instead of the fourteen thousand dollars which was there?

A. Yes, sir.

Q. They charge you in their answer with having knowingly and intentionally made claim for nine thousand dollars' worth of ore when you knew there wasn't that there. State whether or not you believe that to be false?

Objection by Mr. Robertson.

A. That's absolutely an untruth.

The Court: I think he may answer.
To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

Mr. Robertson: It is leading and suggestive.

The Court: Objection overruled.
To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

Q. State whether or not you believed the statement made in your proof of loss true?

A. Absolute God's truth.

Q. State whether or not you had any intention, when you made those proofs of loss, of defrauding the companies or deceiving them?

A. Absolutely none.

Q. State to the jury, please, why, as Mr. Robertson suggested to your son, you couldn't have hunted around and got this gold after the fire?

A. No, sir; simply because the storms was so terrific that would be

washed away, and Mr. Shaw was the attorney at that time, and asked the privilege from Mr. Herrington to move the stuff that was out there. He wouldn't grant permission or let him. He wouldn't assume the responsibility.

211 Q. Wouldn't allow you to hunt or remove the machinery?

A. No, sir.

Q. That's Mr. Herrington, who is here representing these companies?

Objection by Mr. Robertson.

A: I can make this statement only from Mr. Shaw's—

Mr. Robertson: We object to what Mr. Shaw said.

The Court: Objection sustained.

Q. Mr. Robertson asked your son something about some man being arrested for stealing gold there. State what there is to that?

A. There is absolutely nothing but circumstantial evidence that comes to me by a party.

Q. What's the name of the man that was arrested?

A. It don't know the name of it. I believe the man's name is Hunt.

Mr. Robertson: You don't know anything except what somebody told you?

A. No, sir.

Mr. Robertson: Then I object to it.

Q. Was there any gold stole from your place so far as you know?

Mr. Robertson: We object to that.

The Court: He may answer.

To which ruling of the court, the defendant then and there by its counsel duly excepted and saved its exceptions.

212 A. Our superintendent told me—

Mr. Robertson: Wait a minute; we object.

The Court: Objection sustained.

Q. No matter what had been taken before, you know at the time of the fire there was fourteen thousand dollars of ore there?

A. Absolutely.

Cross-examination by Mr. Herrington:

Q. Now, let's go slowly.

A. All right.

Q. Now, you say there was fourteen thousand dollars of ore that was consumed or disappeared by reason of the fire?

A. Lost by fire.

Q. How much of this that you ship over from the mine was in the shape of rock?

A. I stated to the jury a moment ago, six hundred tons of ore at an average of seven dollars and a half per ton.

Q. The rock assayed that?

A. The rock, part of it, assayed sixty dollars a ton, but I am making an average of seven dollars and a half.

Q. I am just asking you. Now, then, you had how many tons in the bins?

A. Six hundred tons.

Q. Do you say that the fire consumed the ore in the bins?

A. No, sir; but if you would go out there—

Q. Wait; now, just answer my question.

213 A. No, sir; it would not consume the ore.

Q. And if you had six hundred tons of that Cripple Creek rock?

A. Yes, sir.

Q. In bins out there?

A. Yes, sir.

Q. Why, you wouldn't be afraid fire would consume that six hundred tons?

A. No, sir; but—

Q. Now, wait a minute.

Mr. Fauntleroy: I submit he has a right to explain that.

Mr. Herrington: I am not—

Mr. Fauntleroy: I know you are not trying to win this case. I think he has got a right to explain.

Mr. Herrington: I have been trying to be a gentleman.

Mr. Fauntleroy: There hasn't been a more exquisite gentleman on the continent.

The Court: I think the question is proper. Proceed.

Q. Now, then, the ore in the bins, you said that that was destroyed by fire?

A. It was lost by fire, Mr. Herrington. Destroyed and lost is quite a different thing.

Q. It was lost?

A. Lost by fire.

Q. How?

A. Simply by the fact that the bins burned down totally, and the ore scattering over the hills. The heavy rains simply washed that away. I suppose if you go out there now you will find gold on the ore.

214 Q. That's enough. The ore in the bins, you give it an average of what?

A. Seven dollars and a half for six hundred tons.

Q. When you took the ore from the bins you put them in a crusher?

A. Yes, sir.

Q. In that crusher it costs some money to crush it, wouldn't it?

A. That's right.

Q. Then you put it into the roaster?

A. No, sir, put it into roughing rollers and finishing rollers.

Q. Now, then it costs something to do that?

A. That's right.

Q. Now, it comes into the roaster?

A. Yes, sir it goes into the roaster.

Q. That costs money?

A. Yes, sir.

Q. That's what you had to have coal for?

A. No, we burn oil; in the steam plant used coal.

Q. That costs some money?

A. Yes, sir.

Q. From there you put it from the roaster into the cooler?

A. Yes, sir.

Q. That cost- money?

A. Yes, sir.

Q. From there it goes to the—

215

A. Chilean mill.

Q. And that costs money?

A. Yes, sir.

Q. And then it goes where?

A. Goes over the blankets, and finally into the slime tanks.

Q. Now, somebody up at Cripple Creek was charged with taking that after—they weren't charged with taking the rock?

A. No, no.

Q. They were charged with taking it after it got into the slimes where it was very valuable?

A. That's hearsay. I know nothing about that, and I know there was only one hundred dollars stolen.

Q. There was only one hundred dollars?

A. About.

Q. Stolen. Was there anything left of the slimes?

A. I don't know. The main values were not in the slimes. Fifty per cent of the gold goes into the amalgam room.

Q. Was it in there?

A. Nobody could get into that.

Q. The better part was in the amalgam?

A. Not the principal part; the entire *values* were scattered over the mills. The new mills, it takes forty-six months to get a clean-up.

Q. Now, you are getting me confused. Now, the principal value was in the amalgam?

A. That is, the rich value.

Q. That was the biggest part of the fourteen thousand dollars?

216 A. No, sir, forty-five hundred dollars, as I stated, was in crude ore which you will find at Cripple Creek today, and in the crushing department I can't say whether there was one thousand or two thousand.

Q. How much was in the amalgam?

A. I can't say. It is impossible to tell that until you make a final clean up. We made a preliminary clean up that the *makes* makes in four to six months.

Q. But there was part of it in amalgam?

A. Yes, sir, walls and crevices and every part of the wood becomes saturated with it.

Q. Can you ever recover that?

A. Yes, sir, whenever you make a final clean up you get all those values, and some times it sums fifty thousand dollars you get from an old mill.

Q. This was a new mill, wasn't it?

A. Yes, sir,

Q. Now, when you say there was a loss there of fourteen thousand dollars do you mean a loss of that from an assay or from a produced product?

A. I can only say everything over in excess of the six hundred tons crude ore was absolutely a total loss in the values of the mill.

Q. You are coming to a conclusion?

A. No, sir, it is a fact.

Q. When you say there was fourteen thousand dollars of loss of gold in process?

A. Yes, sir.

Q. That there was a loss, a net loss, or wouldn't you, to have got that much gold, had to have spent this money all along through the process?

217 A. It is true, but you could figure that labor out with that amount there in the mill.

Q. You say there was fourteen thousand dollars?

A. Crude ore at the mill.

Q. And do you, in figuring this loss, deduct what it would have cost to roast, crush and go along through the different processes you have described to get it to the amalgam?

A. Not under the existing circumstances, I couldn't where the loss was sustained instantly. Not where you have sustained the loss instantly by fire.

Q. How long was it before that ore in those bins had washed away?

A. Shipped in the month of December; we sent over nine hundred tons of ore.

Q. You said you had some ore or rock from the Midget?

A. Yes, sir.

Q. In the bins?

A. Yes, sir.

Q. Well, now, that rock is harder than the granite that you see around here?

A. It is as hard as flint.

Q. Yes. Now, you say the bins burned down. Of course, this rock didn't melt?

A. No, sir.

Q. No. Now, how long was it that that rock was there after the fire?

A. After the fire?

Q. Yes.

218 A. That rock, immediately, six hundred tons in wooden ore bins, would scatter everywhere over the entire hill, because the mill is on down grade.

Q. What would scatter it?

A. Rains; heavy rains would scatter ore by reason of the fact that the ground would give way and the rock being heavy.

Q. It wasn't burned up?

A. It is not burned up, no, sir, but it is destroyed.

Q. So, the rock wasn't burned up?

A. Sir?

Q. It was due to the rains subsequent to the fire?

A. I can't state as to that. If you go out there you probably will find the rocks scattered where the ore bins are.

Q. They are there yet?

A. Yes, but it would cost considerable to haul it to another mill.

Q. You had some sixty dollars ore there?

A. Mixed up with the lower grades.

Q. That's out there?

A. You understand what I mean. There is thirty and fifty and five and six, and that's how I average it. The Bonanza gang made a strike in December and I was shipping some of that ore in. I was president of the company and know what I am talking about.

Q. Well, did you notice, did you read on this ore and gold in process business, read what the rider says?

A. (Reading from policy:) "The term ore and gold in process shall be taken to include ore and all products derived therefrom by treatment or otherwise including gold therein or in whatsoever form or association with other material the same may be, except gold which has been amalgamated or melted into buttons or bars."

Q. Except gold?

A. Yes, which has been amalgamated into buttons or bars. There was none amalgamated into buttons or bars.

Q. But there was some amalgamated?

A. There may have been in the forms of slimes, which are not bars.

Q. What's it amalgamated with? Zinc?

A. They use chemicals.

Q. It amalgamates into zinc or lead?

A. Yes; I am not the chemist; I am not the metallurgist.

Q. You don't know how much you had in there into that?

A. No, sir.

Q. So, that the way you got at this fourteen thousand dollars is by saying that you are president of the Bonanza—

A. Midget Bonanza.

Q. Midget Bonanza Mine and also president of the Gold Issue Mining and Milling Company?

A. Yes, sir.

Q. And you as president of the Bonanza Midget took out some choice rock?

A. No, sir.

220 Q. Took out some choice and unchoice, some two and four and eight and up to sixty, and put it into bins, from the Bonanza mine, into the bins of the Gold Issue Mining and Milling Company?

A. Yes, sir.

Q. And sold it as president of one company to the other as president?

A. Yes, sir.

Q. And reached the conclusion that some day, after that rock had passed through the bins or passed through these different processes, you would have got out fourteen thousand dollars?

A. No, sir, not necessarily so. I know, with the fact in the month of August, September; August, September and October to the end of the year we didn't make, didn't intend to make, a clean-up; I know just how much in dollars and cents was in there in respect of the percentage of extraction; we figured ninety per cent.

Q. Don't people ordinarily, when they make a clean up, take all there is available?

A. Not at all, no, sir.

FRED L. SHAW, being duly sworn, testified as follows, to-wit:

Direct examination by Mr. Fauntleroy:

Q. What is your name?

A. Fred L. Shaw.

Q. What is your business?

A. An attorney and counsel.

Q. Where do you live?

221 A. Cripple Creek, Colorado.

Q. How long have you lived and practiced there?

Q. Nearly twenty years; I have been there ten years.

Q. Where were you born, and where did you go from out there?

A. Dixon, Illinois.

Q. How far is that from here?

A. Seven or eight hundred miles, I imagine.

Q. Man of family?

A. Yes, sir.

Q. Do you know Mr. Kilpatrick and Mr. Hanley?

A. Yes, sir.

Q. These insurance agents that have been spoken of?

A. Yes, sir.

Q. Did you represent this plaintiff, the Gold Issue Mining and Milling Company, after the fire?

A. Yes, sir, I was retained.

Q. State what, if any, conversation you had with Kilpatrick and Hanley about trying to take care of this property? What you said to them and what they said to you?

Mr. Herrington: We object, if Your Honor please. After the loss has occurred the company can't be bound by what the agents do, or what conversation they may have, after the loss occurred.

Mr. Fauntleroy: Authorities hold that where an agent is once shown, it continues, and they were the general agents of the companies; they hold that in the McCullough case.

222 Mr. Robertson: After the fire?

Mr. Fauntleroy: Yes, sir; the authority once shown is presumed to continue.

The Court: It doesn't seem to me the authorities hold that.

Mr. Fauntleroy: That's what they held in the Ball case. Your Honor tried that case.

The Court: In that case the Court of Appeals tried to adjust the loss.

Mr. Fauntleroy: The policy provides they shall put the property in shape. These agents, they are the company. An agency once shown is presumed to continue. That's what the McCullough case says. They were the company before the fire, and the company after the fire. We went to them for directions and they refused to allow us to do anything. If they represent the company in all matters before the issuance of the policy and the agency is presumed to continue until the contrary is shown. It seems to me they are the company. As Judge Marshall says, they can't be the general agents of the company to make contracts and drag in the money, to reap the harvest, and after the loss occurs to say that they are not the agents and have no authority to act in the matter. They continue to be the agents of the company.

The Court: Have you any authority from Colorado to that effect?

Mr. Fauntleroy: No. Well, I have some authority before the fire.

The Court: I mean after the fire.

223 Mr. Fauntleroy: No, but in the absence of any law to the contrary the law is presumed to be the same as our law on that subject. If Your Honor will permit me, I will go and get that case.

(The objection is argued at length by counsel for both sides.)

The Court: What is the general scope of this testimony you desire?

Mr. Fauntleroy: That after the fire this gentleman, as the representative of the plaintiff, went to the agents who countersigned this policy, Kilpatrick and Hanley, and asked them permission to go in there and safe this property and they refused to allow them to move it or touch it. It bears upon the cry that's being made that that gold was there and they could have hunted for it and found it. Bears upon the bona fides of this claim.

The Court: Then, if I understand you, you are offering that testimony solely upon the theory of accounting for the alleged lack of effort to save the gold after the fire?

Mr. Fauntleroy: Yes, and bearing upon the loss; our people say it can't be gotten. They ask them why they couldn't get it. * * * I want to show by this witness that we tried to save that property, and the representatives of this company, who were the company themselves, prohibited us from doing anything. It bears not only upon the amount of the loss but bears upon the bona fides, and it may bear upon this, which occurs to me that I think probably is stronger reason than any: "If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is

extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, etc.³; Under this clause of the policy we have got a right to show it. They had no other representative there at that time. These agents were the company. We went there and asked to be permitted to go in and save that property, and they refused to allow us to do it.

Mr. Robertson: We have no right to refuse under that policy.

The Court: What do you say about it being admissible on the issue of good faith on the part of the insured?

Mr. Robertson: It is not of good faith in the question as to whether or not that rock was destroyed or could be reclaimed.

The Court: Question of faith in the amount of damage claimed. He claimed in his proof of loss the loss was ninety-five hundred dollars. You claimed that was an amount so largely in excess of what they did lose that it was a fraudulent claim.

Mr. Robertson: I don't see how that can have any good faith at all.

The Court: I think it is admissible on the theory of good faith, but it is admitted on no other theory.

225 To which ruling of the Court the defendant then and there by its counsel duly excepted and saved its exceptions.

Q. Did you have a talk with Kilpatrick and Hanley after this fire for and on behalf of the plaintiff?

A. I had some conversation.

Mr. Robertson: I don't see, if it is not admissible on the ground that they were not the agents of the company at the time, it wouldn't be admissible at all.

The Court: The issue of good faith, I don't think is limited to necessity.

Mr. Robertson: Then if it is on that theory they are trying to get conversation with Kilpatrick and Hanley, then it is not admissible for any purpose any more than any other conversation would be.

The Court: I think anything that tended to prevent the examination would be admissible upon the issue of good faith. A man might act and act without proper authority, but if he acted in good faith it would bear as to whether his affidavit in proof or loss was intentionally false.

Q. State when and what the conversation with Kilpatrick and Hanley was?

A. I couldn't state the exact time. It was some time before I prepared proof of loss and notice. I wanted permission, and asked them for it, to remove anything that might be there of any value, and I put it on the ground that there was a watchman there being paid and wanted that expense eliminated, and requested that they obtain permission to do that from the company. I think

226 I wrote a letter to that effect to Mr. Herrington.

Q. What did Kilpatrick and Hanley tell you?

A. They didn't refuse, but they didn't consent to it.

Mr. Robertson: I object and ask that the answer be stricken out, that the testimony be stricken out.

The Court: Objection sustained; motion sustained.

A. He said he would correspond with the company.

Q. Did he ever make any further response?

A. That's all.

Mr. Fauntleroy: I submit if they said they would correspond with the company, and they didn't get any word from that that's a voluntary refusal.

Mr. Robertson: I move to strike it out.

The Court: Motion to strike out sustained.

Mr. Fauntleroy: That's all.

Mr. Robertson: That's all.

Mr. Fauntleroy: I now offer in evidence the motion filed September 4th, 1911, to quash the writ and return showing general appearance in the case, filed by the defendant.

The Court: You offer that motion showing the appearance?

Mr. Fauntleroy: Yes, sir.

The Court: Any objection, Mr. Robertson?

Mr. Fauntleroy: It was on that motion that the Supreme Court held that it was a general appearance.

Mr. Robertson: We object to it. Instead of showing the 227 appearance, it shows the opposite. We object to it, also, on the ground that it is not pleaded that there was any general appearance in the reply. On the other hand, the plea to the jurisdiction was simply put in issue by the denial.

Mr. Fauntleroy: I think I specifically allege it.

The Court: I think under the issue of general denial it shows the facts, and in view of the intimation I will admit it in evidence for that purpose. It will be considered in evidence.

To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

The above motion admitted in evidence is in words and figures as follows, to-wit:

"STATE OF MISSOURI,
County of Audrain, ss:

In the Circuit Court, September Term, 1911.

THE GOLD ISSUE MINING & MILLING COMPANY, Plaintiff,
vs.

THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
Defendant.

Now comes the defendant herein and appearing for the purposes of this motion and for the purposes of this motion only, moves to quash the writ herein issued and the return thereon by the Sheriff of Cole County and dismiss the cause for the following reasons, to-wit:

I.

The circuit court of Audrain County and no other court of the state of Missouri has jurisdiction over the person of the defendant herein nor over the subject matter of said action.

228 The plaintiff is a corporation existing under the laws of the territory of Arizona but attempting to engage in business in the state of Colorado and also attempting, according to the allegations of the petition herein filed, to exercise its corporate powers in the state of Colorado; and according to the allegations of plaintiff's petition, was the owner of the property in said petition described in the state of Colorado; and the defendant is a foreign corporation of the state of Pennsylvania doing business as an insurance company in the state of Missouri and also in the state of Colorado: That the alleged contract sued upon by plaintiff was made in the state of Colorado, and the insurance against fire by said alleged policy was against loss of property located in the state of Colorado; and said fire by which said property is alleged to have been destroyed took place in the state of Colorado. Hence, the alleged contract sued upon and the alleged cause of action in plaintiff's petition, if any, is a contract under the laws of Colorado and the cause of action arose in the state of Colorado and is local in the state of Colorado:

That the defendant corporation is an insurance company of the state of Pennsylvania, and hence is a resident and a citizen of the state of Pennsylvania:

That the said contract and said cause of action is local in the state of Colorado and is not a contract nor a cause of action in the state of Missouri: That under and by virtue of Section 7042 of the Revised Statutes of Missouri, 1909, a foreign insurance company is required upon condition of doing business in the state of Missouri to make the superintendent of the insurance department of the 229 state of Missouri its agent upon whom service of process issuing out of the courts of the state of Missouri might be had; but said superintendent of insurance is and can be an agent for the purpose of service of process upon only for the benefit of citizens of the state of Missouri and a cause of action arising in the State of Missouri out of contracts made in the state of Missouri; and said section is solely for the benefit of actions local in the courts of the state of Missouri; and said superintendent of insurance is not an agent for the purpose of having process served upon him for a cause of action arising outside of the state of Missouri and in behalf of non-residents of the state of Missouri; and the said Frank Blake, the said Superintendent of the Insurance Department of the State of Missouri, upon whom service was had in said action, is not an agent for this defendant upon whom process could be served in the alleged cause of action set forth in plaintiff's petition.

Wherefore, this defendant says that this court has not jurisdiction over the subject of this action nor over the person of this defendant.

II.

The bringing of this action in the state of Missouri and outside of

the state of Colorado is an attempt on the part of the plaintiff to make use of the courts of the State of Missouri to deprive the defendant of judicial process by which it may procure the attendance of witnesses on its behalf in a defence of the merits of said cause of action: that this defendant is entitled to a defence on the merits of said cause of action and has a defence thereto consisting as follows: First, said policy is void; second, said policy became void by reason of acts of the defendant after the issue of said policy; third, it is void in fact and in law; fourth, the defendant was not the sole and unconditional owner of said property described in said petition at the time of the issuing of said policy, neither was it the sole and unconditional owner thereof at the time of the alleged fire; and further, the plaintiff has avoided said policy and caused the same to become null and void by its violation of the terms of said policy; and said plaintiff did not have destroyed by fire a portion of the property as alleged in its said petition:

That said petition presents many issues which the defendant acting on its own behalf will be compelled to defend against, and there is a large amount of testimony in the way of witnesses and in the way of documentary evidence, all located in the state of Colorado, which this defendant cannot produce in any court of the state of Missouri by judicial process, and for that reason this court should not take jurisdiction of said cause and cannot have jurisdiction of said cause; and to be allowed to maintain said action in the state of Missouri would be to deprive the defendant of that due process of law which the Constitution of the State of Missouri guarantees to every foreign insurance company entering the state for the purpose of doing business therein; and to allow said action to be prosecuted in the state of Missouri is to deny to the defendant the equal protection of the laws, and is, therefore, in disobedience to Section 1 of Article XIV of the Constitution of the United States which provides that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

FRED HERRINGTON,
ROBERTSON & ROBERTSON,
Attorneys for the Defendant.

STATE OF MISSOURI,
County of Audrain, ss:

Geo. Robertson, being duly sworn, upon his oath says that he is the agent and attorney for the foregoing defendant and that the foregoing motion and the facts therein stated are true according to his best knowledge, information and belief.

[SEAL.]

GEO. ROBERTSON.

Subscribed and sworn to before me this 31st day of August, 1911.

AGNES C. REUTER,
Notary Public.

My commission expires December 8, 1914."

Said motion bears on the back thereof the following endorsement:
"The Gold Issue Mining & Milling Company, Plaintiff, vs. Pennsylvania Fire Insurance Company of Philadelphia, Defendants. Motion to Quash Writ & Return. Filed Sep. 4 1911. E. F. Elliott, Circuit Clerk, by _____, Deputy. Fred Herrington, Robertson & Robertson, Attorneys For Defendants."

232 Mr. Fauntleroy: Mr. Robertson, have you got the stipulation that any Pacific Reporter can be read?

Mr. Robertson: You have that. There is no controversy.

Mr. Fauntleroy: There is no controversy that either side may show in the Pacific Reporter any decision of the Supreme Court of Colorado or the Court of Appeals. I now offer in evidence the case of Ohio-Colorado Mining and Milling Company against Elder, found in the 99th Pacific Reporter, pages 42 to 44.

Mr. Fauntleroy: We make no objection. We plead the same case.

The Court: It will be admitted in evidence.

The above case is in words and figures as follows, to-wit:

Ohio Colorado Mining and Milling Company v. Elder, 99
Pacific Reporter, pp. 42-44:

(By leave of court the decision not printed but is considered a part of the record.)

Mr. Fauntleroy: Now, Your Honor, I offer the case of Rollins versus Fearnley, decided by the Supreme Court of Colorado, April 5th, 1909, and found on pages 345 to 348 of the 101st Pacific Reporter.

Mr. Herrington: You didn't plead it, did you?

Mr. Fauntleroy: I don't know whether I did or not. I don't think it is formally set up in the answer?

Mr. Herrington: We make the general objection. It hasn't been pleaded.

233 The Court: Do you mean by that objection the specific case by name has not been pleaded?

Mr. Herrington: Oh, no. We make the general objection, in the practice in this case you have got to plead to prove the foreign law, and they haven't pleaded this foreign law. I don't object to the Pacific Reporter.

The Court: I mean the specific case by name. In other words, your theory is that in his answer he would have to name the case?

Mr. Herrington: Yes, sir.

Mr. Robertson: And also set out the substance of the law.

The Court: Doesn't he plead the law in general terms?

Mr. Robertson: I don't think he does.

The Court: As I recollect the reply, he pleads the law in general terms, but there having been no specific cases mentioned, wouldn't the cases be admissible under the pleading of the law?

Mr. Robertson: One point is, that he hasn't even pleaded the law in the case.

Mr. Fauntleroy (reads from the answer): I plead that in general terms; then I pleaded again in half a dozen cases.

The Court: It seems to me, gentlemen, that the reply sufficiently advises the defendant that the plaintiff is relying upon that condition of law. It may not be pleaded as definitely as it might have been done, but I think it is sufficient to advise them, and that being the case, I take it any case tending to show what the law is 234 is admissible, whether it is pleaded or not. The objection is overruled. It will be admitted.

To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

Mr. Herrington: That's the 101st Pacific?

Mr. Fauntleroy: Yes, sir, page 346, 345 to 348, Rollins against Fearnley.

The above case admitted in evidence is in words and figures as follows, to-wit:

Rollins v. Fearnley, 101 Pacific Reporter, pp. 345-348:

(By leave of court the decision is not printed, but is considered a part of the record.)

Mr. Fauntleroy: I now introduce in evidence the case of International Trust Co. v. Leschen & Sons Rope Co., 92nd Pacific Reporter, pages 727 to 731, inclusive.

Mr. Robertson: You offer the entire case?

Mr. Fauntleroy: Yes, sir, the case of the International Trust Company against A. Leschen and Sons Rope Company.

Mr. Robertson: 41st Colorado.

The Court: The whole case will be considered in evidence.

The above case being admitted in evidence is in words and figures as follows, to-wit:

International Trust Company v. A. Leschen & Sons Rope Co., 92 Pacific Reporter, pp. 727-731:

235 (By leave of court the decision is not printed, but is considered a part of the record.)

The above case is read to the court by Mr. Fauntleroy.

Mr. Fauntleroy: I now offer in evidence the case of Miller against Williams, 59th Pacific, by the Supreme Court of Colorado, dated December 19th, 1899, found on pages 740 to 743, inclusive.

The Court: No objection to this case?

Mr. Herrington: No, sir.

The Court: It will be admitted in evidence.

Mr. Fauntleroy reads from the above case which is admitted in evidence and which is in words and figures as follows, to-wit:

Miller v. Williams, 59 Pacific Reporter, pp. 740-743:

(By leave of court the decision is not printed, but is considered a part of the record.)

Mr. Fauntleroy: I now offer in evidence the case of Farmers and Merchants Insurance Company versus Nixon, 30th Pacific Reporter, pages 42 and 43, decided by the Court of Appeals of Colorado.

There being no objection the above case is admitted in evidence, and is read by Mr. Fauntleroy, and is in words and figures as follows, to-wit:

Farmers and Merchants Insurance Company v. Nixon, 30 Pacific Reporter, pp. 42-43:

236 (By leave of court the decision is not printed, but is considered a part of the record.)

Mr. Fauntleroy: I now offer in evidence the 94th Pacific (42 Colorado Reports). I now offer in evidence the German-American Insurance Company against Hyman, and the German Alliance Insurance Company against the same, found in the 94th Pacific, commencing at page 27 and running through to page 35.

Mr. Herrington: No objection.

The Court: The whole case is in evidence.

The above case is read by Mr. Fauntleroy and is in words and figures as follows, to-wit:

The German American Insurance Company v. Hyman; German Alliance Insurance Company v. Same, 94 Pacific Reporter, pp. 27-35:

(By leave of court the decision is not printed, but is considered a part of the record.)

Mr. Fauntleroy: In this same book of 94th Pacific there is another case which I offer in evidence. It's the—Oh, I suppose that's the same one.

Mr. Herrington: That's the two cases.

Mr. Fauntleroy: Are they on different pages?

Mr. Herrington: I think not.

Mr. Fauntleroy: Your Honor, I now offer in evidence the 48th Pacific, 822. I now offer the case of Strauss against the Phenix Insurance Company, Court of Appeals, Colorado, in the 48th Pacific Reporter, pages 822 to 825.

237 Mr. Herrington: What's the title of that?

Mr. Fauntleroy: Strauss versus Phenix Insurance Company. I am offering the Strauss case.

The Court: The entire case will be admitted in evidence.

(Mr. Fauntleroy reads from the above case, admitted in evidence, which case is in words and figures as follows, to-wit):

Strauss v. Phenix Insurance Company, 48 Pacific Reporter, pp. 822-825:

(By leave of court the decision is not printed, but is considered a part of the record.)

Mr. Fauntleroy: Now, the 53rd Pacific—55th Pacific. I now

offer in evidence the case of *Elvitiou* Swiss Fire Insurance Company versus Edward A. Allis and Company, decided by the Court of Appeals, Colorado, April 11th, ninety-eight. 53rd Pacific Reporter, page 242 running through to the bottom of page 247.

There being no objection the above case is admitted in evidence and is read by Mr. Fauntleroy, and is in words and figures as follows, to-wit:

(Clerk here copy the case of Helvetia Swiss Fire Insurance Company versus Edward P. Allis and Company, found in the 53rd Pacific Reporter, page 242 running through to the bottom of page 247.)

Helvetia Swiss Fire Insurance Company v. Edward P. Allis & Co., 53 Pacific Reporter, pp. 242-247:

(By leave of court the decision is not printed, but is considered a part of the record.)

238 Mr. Fauntleroy: I will introduce another statute which imposes a penalty for a foreign corporation. I now offer in evidence section 909, Chapter 30, page 381, of the Revised Statutes of Colorado for the year 1908.

Mr. Robertson: It only provides a penalty for a certain thing and doesn't relate to the validity of the contract.

Mr. Herrington: It ought to come in in connection with 916 and 917.

Mr. Fauntleroy: I haven't any objection to them introducing them. You don't object to it on the ground that the book is not properly authenticated?

Mr. Robertson: No, sir. It is not pleaded; we object to it for that, and for another reason: It related to other sections and those sections ought to be read in connection with it, and besides that, the only purpose of the statute is to impose a penalty upon the officers of foreign corporations for failing to comply with the law, and has nothing to do with the section of the statute which is pleaded.

The Court: The objection will be overruled.

To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

Mr. Herrington: Read it to the court, and I will ask the court if it doesn't think the other sections ought to go in.

Mr. Fauntleroy: What are the other sections you want put in?

Mr. Herrington: I am objecting to any of them, but 239 sections 23 and 24, failure to comply with those sections, you see by the reference, are sections 916 and 917, immediately preceding.

Mr. Fauntleroy: Well, I offer those sections in evidence, 916 and 917.

The Court: Very well. Sections 916 and 917 will be considered in evidence in order to elucidate the meaning of 919.

Mr. Fauntleroy: That was section 919, instead of 909.

Mr. Robertson: Call the attention of the reporter to the volume.

Mr. Fauntleroy: Revised Statutes of Colorado, year 1908; there is no point made that it has not been properly certified to. This revised edition of the statute is authorized by the 16th General Assembly. That was sections 919, 916 and 917 offered.

The above sections admitted in evidence are read by Mr. Fauntleroy and are in words and figures as follows, to-wit:

Section 916, Revised Statutes of Colorado for 1908.

"916. Must file copy of charter.—Sec. 72. Every company incorporated under the laws of any foreign state or kingdom or of any state or territory of the United States, beyond the limits of this state, and now or hereafter doing business within this state shall file in the office of the secretary of state a copy of their charter of incorporation; or in case such company is incorporated by certificate under any general incorporation law, a copy of such 240 certificate and of such general incorporation law duly certified and authenticated by the proper authority of such foreign state, kingdom or territory (G. S., par. 261; G. L., par. 214.)

(For filing fees see sections 904, 906 and 907.)"

Section 917, Revised Statutes of Colorado for 1908.

"917. Designation of place of business and agent.—Restrictions.—Sec. 73. Foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the secretary of state, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state residing at its principal place of business upon whom process may be served; and such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon such corporations of like character organized under the general laws of this state, and shall have no other or greater powers. And no foreign or domestic corporation, established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in this state except as provided for in this act, and no corporation doing business in this state, incorporated under the laws of any other state, shall 241 be permitted to mortgage, pledge or otherwise encumber its real or personal property, situated in this state, to the injury or exclusion of any citizen, citizens or corporations of this state, who are creditors of such foreign corporation, and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other state, shall take effect as against any citizen or corporation in this state, until all its liabilities due to any person or corporation in this state at

the time of recording such mortgage, have been paid and extinguished; Provided, however, that if any foreign corporation other than those expressly mentioned herein, intending or desiring to mortgage any or all of its property for any debt created or to be created in any other state, shall give notice of such intention or desire by publication for six (6) successive weeks prior thereto, in some daily or weekly newspaper printed within the county wherein the property so intended or desired to be mortgaged is situated, or if there be no such newspaper, by posting such notices in five (5) public places within such county, requesting all citizens and corporations of this state, having any claims or demands of any kind or nature whatsoever against the said foreign corporation, to file the same duly verified with the county clerk of the county in which such property so desired to be mortgaged is situated, on a date specified in such notice, which date shall be subsequent to the date of the last publication of such notice or in case of failure so to file such claim or demand, then and in such case, a mortgage given by such foreign corporation to secure any debt created in any other state, shall take effect as against any citizen or corporation of this state, who shall fail to file his or its claim (L. '93, p. 88, par. 1; amending G. S., par. 260; G. L., par. 213)."

Section 919, Revised Statutes of Colorado for 1908.

"919. Liability for failure to file documents.—Sec. 75. A failure to comply with the provisions of sections 23 and 24 of this act shall render each and every officer, agent and stockholder of any such corporation, so failing herein, jointly and severally personally liable on any and all contracts of such company made within this state during the time that such corporation is so in default (G. S. par. 262, G. L. par. 215.)

(Sections 23 and 24 referred to are sections 916 and 917.)"

Mr. Fauntleroy: I now offer in evidence section 905, page 376, under the chapter entitled "corporation, fees and reports," of the Revised Statutes of Colorado for the year 1908, which is the book that I have just been reading from.

Mr. Herrington: Same objection.

The Court: Objection overruled. It will be admitted.

To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

The above section is in words and figures as follows, to-wit:

Section 905, Revised Statutes of Colorado for 1908.

"905. Increase of capital stock of foreign corporation.—Fees.—
Quo warranto.—Sec. 61. Any foreign corporation, joint stock
243 company or association, incorporated by or under any general or special law of any foreign state or kingdom, or of any state or territory of the United States, beyond the limits of this

state, that has since the filing of its certificate in this state, increased its capital stock without paying the fees prescribed by the law of this state at the time of such increase, or that shall hereafter increase its capital stock, shall be liable to pay the fees prescribed by this act, and it is hereby made the duty of the secretary of state to at once cause an action to be brought against any foreign corporation, joint stock company or association for the recovery of such fees, and a certified copy of the certificate of such increase on file in any foreign state shall be sufficient evidence to sustain a judgment for the amount of such fees, and an action in the nature of a writ of quo warranto shall lie against any foreign corporation, joint stock company or association to test its right to exercise corporate franchises in this state, while so in default in payment of such fees (L. '01, p. 19, par. 5.)"

Mr. Fauntleroy: I now offer in evidence the case of Hartford Fire Insurance Company vs. Smith et al., in the 3rd Colorado Supreme Court reports, commencing at page 422 and going down through to the middle of 428.

Mr. Herrington: You haven't pleaded that?

Mr. Fauntleroy: I don't think that I have.

Mr. Herrington: Same objection.

The Court: Objection overruled.

244 The above case being admitted in evidence is in words and figures as follows, to-wit:

Hartford Fire Insurance Co. v. Smith et al., 3 Colorado Supreme Court Report, pp. 422-428:

(By leave of court the decision is not printed but is considered a part of the record.)

Mr. Fauntleroy: I now offer the 2nd Colorado Appeal Reports, page 488, commencing, and running down through to page 492, the case of Witch against The Equitable Fire and Marine Insurance Company.

Mr. Herrington: You haven't pleaded that. Same objection.

The Court: Objection overruled.

To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

Mr. Fauntleroy: Your Honor will remember that yesterday Mr. Robertson said that the policy is not *prima facie* evidence of title. I will read from this case.

The Court: The case will be admitted in evidence.

(The above case is admitted in evidence and read by Mr. Fauntleroy, and is in words and figures as follows, to-wit:)

Witch v. The Equitable Fire and Marine Ins. Co., 2 Colorado Appeal Reports, pp. 488-492:

(By leave of court the decision is not printed, but is considered a part of the record.)

245 Mr. Robertson: What's the date of that case?

Mr. Fauntleroy: That was decided at the opening of court in 1892, at the September term.

Mr. Fauntleroy: Your Honor, plaintiff rests.

This was all the evidence introduced by the plaintiff in chief.

Thereupon the defendant prayed the court to give to the jury the following instruction, it being a demurrer to the plaintiff's evidence:

Demurrer at Close of Plaintiff's Evidence.

"March 15, 1912.

GOLD ISSUE, &c., Co.

vs.

PENN. FIRE, ETC., Co.

At the close of the evidence for the plaintiff the court instructs the jury that under the pleadings and the evidence the plaintiff is not entitled to recover and you will return a verdict for the defendant."

Which demurrer was by the court overruled, to which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

Evidence for Defendant.

Thereupon the defendant, to sustain the issues on its part, introduced evidence as follows, to-wit:

Mr. Robertson: We offer—we will offer our law in evidence, Your Honor.

The Court: Very well. Proceed with the evidence.

246 Mr. Robertson: We offer in evidence section 904 and 910 from the Revised Statutes of Colorado, year 1908, same print and volume that you read from, Mr. Fauntleroy.

The Court: It will be considered in evidence.

Mr. Robertson: Section 904 is on page 376, and 910 is on page 377.

Mr. Herrington: These were passed by the General Assembly of Colorado, 1908. That's true, isn't it, Mr. Shaw?

Mr. Fauntleroy: Just one moment. You are offering the book, I suppose it shows.

Mr. Robertson: Yes, sir; it does.

Mr. Fauntleroy: We are not admitting anything.

The above sections admitted in evidence are read by Mr. Robertson, and are in words and figures as follows, to-wit:

Section 904, Revised Statutes of Colorado for 1908.

"Sec. 904. Fees of foreign corporations—shall not do business until fees are paid.—Sec. 60.

Every corporation joint stock company or association, incorporated by or under any general or special law of any foreign state or kingdom, or any state or territory of the United States, beyond the

limits of this state, having a capital stock divided into shares, shall pay to the secretary of state, for the use of the state, a fee of thirty dollars in case the capital stock which said corporation, joint stock company or association is authorized to have, does not exceed 247 fifty thousand dollars; but in case the capital stock thereof is in excess of fifty thousand dollars, the secretary of state shall collect the further sum of thirty cents on each and every thousand dollars of such excess, and a like fee of thirty cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of the certificate of incorporation, articles of association or charter of said corporation, joint stock company or association in the office of the secretary of state, and no such corporation, joint stock company or association shall have or exercise any corporate powers or hold or acquire any real or personal property, franchise, rights or privileges, or be permitted to do any business or prosecute or defend in any suit in this state until the said fee shall have been paid."

Section 910, Revised Statutes of Colorado for 1908.

"Sec. 910. Certificate of Authority—Fee—Shall not transact business without.—Sec. 66.

No corporation joint stock company or association, incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom or of any state or territory of the United States, beyond the limits of this state, shall exercise any corporate powers or acquire or hold any real or personal property, or any franchise, rights or privileges, or do any business or prosecute or defend in any suit, in this state until it shall have received from the secretary of this state a certificate setting forth that full payment has been made by such corporation, joint stock company or association, of all fees and taxes prescribed by law to 248 be paid to the secretary of state, and every such corporation, joint stock company or association shall pay to the secretary of state for each certificate, a fee of five dollars. Nothing in this section shall apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes."

Mr. Robertson: In connection with that—Will you get me that stipulation filed, Mr. Clerk? I want to read in evidence the stipulation filed. (Reading.) "State of Missouri, County of Audrain. In the Circuit Court, May Term, 1912. Gold Issue Mining and Milling Company, plaintiff, against Fidelity, Phenix Fire Insurance Company." (It was agreed verbally that this stipulation should apply to any case on trial. "It is stipulated and agreed for the purposes of this case, and also in all the cases of this same plaintiff against thirteen other insurance companies, now pending in this court, that said plaintiff did not prior to January 10th, 1911, have a certificate from the Secretary of State of Colorado to do business in the said State of Colorado, but that such certificate was duly issued to plaintiff on said last named date, January 10th, 1911, and that the same may be

introduced in evidence subject to the rules of competency and relevancy only," signed by the attorneys. Mr. Fauntleroy, did you put in evidence your certificate?

Mr. Fauntleroy: Yes, sir.

The Court: It was my understanding it was admitted.

Mr. Robertson: I know we objected once, and the court excluded it.

249 The Court: If you wish to offer it again, it don't matter.
Mr. Shaw: It was marked as an exhibit at the time it was offered.

Mr. Robertson: Just let it be considered in evidence.

The Court: What's the exhibit number?

Mr. Shaw: Exhibit 14.

The Court: Exhibit 14 is offered in evidence by the defendant. It will be considered in evidence.

Exhibit 14 is in words and figures as follows, to-wit:

(Exhibit 14 is printed at p. 139.)

Mr. Herrington: We have pleaded in our answer the case of Jones against The Hardware Company, reported in the 21st Colorado Supreme Court reports, at page 263. 21st Colorado, 263. That is found in the 40th Pacific at page 457. That not being in town it has been agreed that the same case is reported in the 29th Lawyers Reports Annotated, old series, at page 143, and that it may be stipulated that this may be read in lieu of the Colorado or the Pacific reports. This case is cited, as we plead, for the purpose of showing a construction of certain words used in the statute which we have pleaded. The statute applicable to domestic corporations provided that no domestic corporation could acquire or hold any property, exercise any corporate franchises whatever, until this fee to the Secretary of State was paid. (Mr. Herrington reads from the foregoing decision.) This decision was rendered on May 20th, 1895;

this decision was rendered on a statute—and as I am going 250 into now—on the statute word for word termed "domestic corporation paying fee," as is now re-enacted as to foreign corporations; in 1901, I suggested that this statute that we have pleaded as to foreign corporations should be understood as having been enacted on that date. The State Legislature of Colorado passed the statute using the same words, and my contention is: Where a Legislature has used words in a previous statute, and re-enacted it in a subsequent statute, covering the same matter, they are presumed that the Legislature had in view the construction given by the courts to that language, and the courts were bound by the subsequent construction, subsequently by the construction given in the prior statute.

Mr. Fauntleroy: In regard to that case, I object to it. I don't think it has any such meaning as he asserts. The only thing decided was: Some people, local people, got together and tried to form a corporation, but they did nothing; they signed the articles but didn't file them with anybody and a stranger having a claim against one of the parties, which was held to be a partnership, brought a suit and attached the property. The Supreme Court decided this case, held no other proposition at all, and didn't detail in

any degree with the question now before the court, but held simply that until they had done something to become a corporation they couldn't exercise corporate powers, by holding title to property, and said that they were partners, and the language which they used in regard to saying that clearly the taking of property was the exercise of corporate power, had relation to the fact that they never did anything to become a corporation. They were a partnership, and therefore they couldn't exercise any corporate powers.

251 The Court: The court will overrule the objection. The effect of the decision will be taken up later, but the decision as a whole will be admitted in evidence.

The above case admitted in evidence is in words and figures as follows, to-wit:

Jones v. Aspen Hardware Co., 21 Colorado Reports, p. 263 et seq., 40 Pacific Reporter, p. 457 et seq.:

(By leave of court the decision is not printed but is considered a part of the record.)

Mr. Herrington: I would rather take these up later.

The Court: Yes, sir; take them up later.

Mr. Herrington: We have pleaded the case of the Western Electrical Company against Pickett et al., in the 118 Pacific, at page 988, and it is the discussion directly on sections 904 of the statute of 1908, and also 910 of the statutes of 1908. It decided that until you—until this fee is paid, there is no standing of such a foreign corporation; standing in the courts, and I think no standing on any proposition, following somewhat the history of Missouri in the progress from one decision to another, finally coming out flat-footed, as your own courts have done, and I cite this with a good deal of confidence, because they have cited two cases from Missouri. The two leading cases in this state on the proposition of the right of a foreign corporation to come in and do business, and when they are caught to step out, after they are caught asking they come in and be good children and pay up. Your courts have held such corporations are outlaws.

252 The Court: The decision will be admitted in evidence.

The above decision is in words and figures as follows, to-wit:

Western Electric Company v. Pickett et al., 118 Pacific Reporter, pp. 988 et seq.:

(By leave of court the decision is not printed but is considered a part of the record.)

Mr. Herrington: That last case is properly pleaded, I think.

Mr. Robertson: Yes, sir.

Mr. Herrington: Was this Iron Sulphur Company, 31st Colorado, introduced?

Mr. Fauntleroy: I think not.

Mr. Herrington: I introduced in evidence the 72nd Pacific, page what?

Mr. Robertson: Page 1067.

Mr. Herrington: I introduce the Iron Sulphur Mining Company versus Cowie, 31st Colorado, page—What?

Mr. Robertson: 31st Colorado, 450; 92nd Pacific Reporter, 1067.

Mr. Fauntleroy: 92nd Pacific?

Mr. Robertson: No. 72nd, 1067.

Mr. Fauntleroy: Against what company?

Mr. Robertson: Iron Sulphur Mining Company versus Cowie.

253 Mr. Herrington: This statute says a foreign corporation has no greater right than a domestic corporation. They were trying to get into the state without paying the fee, and it is that they couldn't have any greater rights than domestic corporation.

There being no objection the above decision is admitted in evidence and is in words and figures as follows, to-wit:

Iron Silver Co. v. Cowie, 72 Pacific Reporter, pp. 1067 et seq.,
31 Colorado Reports, pp. 450 et seq.:

(By leave of court the decision is not printed but is considered a part of the record.)

Mr. Robertson: Did you introduce Ohio Colorado Company against Elder?

Mr. Fauntleroy: Yes, sir. Your Honor, I am going to ask permission to introduce the 25th Pacific. It is the case of The Colorado Iron Works vs. Sierra Grande Min. Co., decided by the Supreme Court of Colorado November 7th, 1890; 15th Colorado Reporter, 499; on the Pacific Reporter it is from page 325 to 329.

Mr. Robertson: What's the purpose of the case?

Mr. Fauntleroy: That a single act is not doing business.

Mr. Herrington: That's decided in Miller vs. Williams. I am willing that it goes in.

The Court: The case will be admitted in evidence on the part of the plaintiff.

254 The above case is in words and figures as follows, to-wit:

(Clerk here copy the above case of the Colorado Iron Works vs. Sierra Grand Mining Co., found in the 15th Colorado Reporter at page 499; also found in the 25th Pacific Reporter, page 325 to 329, inclusive.)

The Colorado Iron Works v. Sierra Grande Mining Co., 15 Colorado Reporter, pp. 499 et seq.; 25 Pacific Reporter, pp. 325-329;

(By leave of court the decision is not printed but is considered a part of the record.)

Mr. Herrington: Our exhibits have not been introduced; they have been left with the clerk, I think. These are the exhibits that we identified yesterday.

Mr. Robertson: We offer in evidence Exhibits 18, 19, 20, 16 and 17 and 21.

The Court: 21 is different from the others?

Mr. Robertson: Yes, sir.

The Court: Submit those first.

Mr. Robertson: As identified by Mr. Depke.

Mr. Fauntleroy: We have no objection to them, Your Honor.

The Court: Very well, the exhibits may be read. They are admitted.

Exhibits 18, 19, 20, 16 and 17, admitted as above, are in words and figures as follows, to-wit:

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"EXHIBIT 16.

"The Gold Issue Mining and Milling Co.

General Office, Mercantile Building, St. Louis, Mo.

Mines and Mill, Cripple Creek, Colorado.

CRIPPLE CREEK, COLO., Febr. 9th, 1910.

Kilpatrick & Hanley, Cripple Creek, Colo.

DEAR SIRS: Mr. Gehm, of The Colorado Trading & Transfer Company, phoned me that on account of scarcity of Coal, he would be compelled to limit our supply. In consequence I deemed it advisable to cease Milling operations for the time being.

In order that the coal proposition will not interfere with our operations, in the future it is intended to connect our Boiler House with Tram and secure our supply of Coal direct from the Coal Mines.

Yours truly,

THE GOLD ISSUE MINING & MILLING CO.
J. F. W. KOEPKE, Pres."

"EXHIBIT 17.

"The Gold Issue Mining and Milling Co.

General Office, Mercantile Building, St. Louis, Mo.

Mines and Mill, Cripple Creek, Colorado.

CRIPPLE CREEK, COLO., April 22nd, 1910.

Kilpatrick & Hanley, Cripple Creek, Colo.

DEAR SIRS: We will not commence Milling operations as I had expected. The Midget and Bonanza King Mines, which supplied us with ore, informed me that they intended to purchase the Gallows frame of The City of Cripple Creek Gold Mining Company, situated opposite the National Hotel. This Gallows frame is 22 feet higher than the one at the Midget Mine. Their object of installing a larger Gallows frame is to construct ore sorting tables above the ore bins adjoining the shaft, which will enable them to

throw out the waste and thus minimize transportation cost to our Mill. Have our coal tram about finished.

Yours truly,

THE GOLD ISSUE MINING & MILLING CO.
J. F. W. DOEPKE, *Pres.*"

EXHIBIT 18.

The Gold Issue Mining and Milling Co.

General Office, Mercantile Building, St. Louis, Mo.

Mines and Mill, Cripple Creek, Colorado.

CRIPPLE CREEK, COLO., May 30th, 1910.

Kilpatrick & Hanley, Cripple Creek, Colo.

GENTLEMEN: Mr. C. E. Miese of Chicago, who represents the City of Cripple Creek Gold Mining Co.; I am informed is in Idaho and is not expected back for several weeks. The purchase of the Gallows frame by the Midget-Bonanza G. M. & M. Co., will in consequence be delayed till his return. We will commence Milling operations as soon as the Midget Company are ready to deliver ore to our Mill.

Yours truly,

THE GOLD ISSUE MINING & MILLING CO.
(Sgd.) J. F. W. DOEPKE, *Pres.*

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EXHIBIT 19.

The Gold Issue Mining and Milling Co.

General Office, Mercantile Building, St. Louis, Mo.

Mines and Mill, Cripple Creek, Colorado.

CRIPPLE CREEK, COLO., July 1st, 1910.

Kilpatrick & Hanley, Cripple Creek, Colo.

DEAR SIRS: I am informed that The Midget-Bonanza G. M. & M. Co., purchased the Gallows frame as spoken of in previous letter. Contract was let out with the Colorado Trading & Transfer Co., to take it down and put it up in place on the Midget property.

When ordered taken down the County Collector informed the Midget Company that there was back taxes due on the Gallows frame. This necessitated writing the former owners concerning this matter. Will advise you from time to time.

Yours truly,

THE GOLD ISSUE MINING & MILLING CO.
(Sgd.) J. F. W. DOEPKE, *Pres.*

EXHIBIT 20.

The Gold Issue Mining and Milling Co.

General Office, Mercantile Building, St. Louis, Mo.

Mines and Mill, Cripple Creek, Colorado.

CRIPPLE CREEK, COLO., July 29th, 1910.

DEAR SIRS: The Midget Company informed me that Mr. Miesse of the City of Cripple Creek Gold Mining Co., had advised them that he would pay the back taxes due on Gallows Frame.

258 I am glad to say that I will soon commence Milling operations. I am told that the Colorado Trading and Transfer Co., contracted to put the Gallows frame up in place on the Midget property, within five days.

Yours truly,

THE GOLD ISSUE MINING & MILLING CO.

(Sgd.) J. F. W. DOEPKE, Pres.

Mr. Robertson: Now, we offer Exhibit No. 21.

The Court: Any objection to 21?

Mr. Fauntleroy: None at all.

The Court: Exhibit 21 will be admitted.

Exhibit 21 is in words and figures as follows, to-wit:

EXHIBIT 21.

(That part of the following application which is in writing, is here printed in italics.)

Policy No. 3,989,219.

Cripple Creek, Colo., Agency.

Application of the Gold Issue M. & M. Co. to the Scottish Union & Nat'l Ins. Co. for Fire Insurance on an Ore Treatment Plant.

1. Names of principal owners? (blank.)
2. Names of President and Officers? *J. F. W. Doepke Pres. & Genl. Mgr.*
3. Address of Head Office? *St. Louis.*
4. When was Company Organized? *1½ yrs. ago.*
5. When was Plant Built and Machinery Installed? *Recently.*
- 259 6. Name of Manager at the Plant? *D. M. Spicer.*
7. When was the Last Dividend Paid? (blank.)
8. Is there a Mortgage on any of the Property? *No.* If so give amount? —. What on? (blank.) When Due? (blank.)
9. Are you Unconditional and Sole Owner of the ground on which Plant stands? *Yes.* If Not, Describe Title. (blank.)

10. Distance and Direction from the nearest R. R. Town of — $2\frac{1}{2}$ miles N. E. from Cripple Creek, Colo. is $2\frac{1}{2}$ miles in a N. E. direction.

11. What Processes are used in the plant? Cyanide & Roasting.

12. Principal Machines and Devices used and Makers' Names? (blank.) From Whom Purchased? (blank.) What, if any, was Second Hand? (blank.)

13. What is the Daily Capacity of Plant? 100 tons.

14. Is the Plant now in Full Operation in all its Departments? Yes.

15. How Many Hours daily is it Operated? 24.

16. How long will the Ore actually blocked out (or actually contracted for, if a Custom Plant) supply the Plant if run at its full capacity? Treating own ore only.

17. If Custom Ore is Treated, what proportion of capacity of the Plant does it constitute? (blank.)

18. What Metals constitute the chief values in the Ore? Gold, Silver, Copper, Lead, Zinc? Gold. If more than one, about what percentage of each? Note percentage under above)

260 19. When was the Plant last shut down, (in whole or in part) or run at less than its maximum capacity? For how long and why? Since plant was remodeled & roaster installed there has been no shut down.

20. What, if any, changes in Process or in Machinery have been made (or are contemplated) and why? none contemplated.

21. If any Litigation within past year state particulars? none.

22. Have Premises, or any part ever caught fire? no. If so, state dates, cause and full particulars of each fire? (blank.)

23. Is the Plant now Treating the Ore at a Profit over and above Operating Expenses, Interest and All Fixed Charges? yes.

24. Have you any fear of Incendiariism? no.

25. Is the Company behind in payment of any bills or of Employees' Wages? no.

26. Further necessary information. (blank.)

(blank.)

(blank.)

THE GOLD ISSUE MINING &
MILLING CO.,

By J. F. W. DOEPKE, Pres.

(Official Title)

Signed in presence of

D. W. KILPATRICK.

Dated this 11th day of November, 1909, at Cripple Creek, Colo.

261 D. W. KILPATRICK, being duly sworn, testified as follows,
to-wit:

Direct examination by Mr. Robertson:

- Q. Where do you reside?
- A. Cripple Creek, Colorado.
- Q. What are your initials?

- A. D. W. Kilpatrick.
Q. How long have you resided there?
A. Nineteen years.
Q. What is your business?
A. Real estate and insurance.
Q. What is your age?
A. Forty-seven.
Q. Married man of family.
A. Married and family.
Q. How long have you been engaged in the insurance business in Colorado?

- A. Seven years.
Q. Were you agent for this defendant, The Pennsylvania Fire Insurance Company, when this policy was taken out?

- A. Yes, sir.
Q. Now, I will get you to state if at the time this policy was taken out any others were taken out by them?
A. Thirteen others.

- Q. That's the same ones that are defendants in this other suit except one?

- A. Yes, sir.
Q. Which is that?
A. The Northern policy.

- 262 Q. Another policy was written in the place of it afterwards?

- A. Yes, sir.
Q. I will get you to state if at the time that policy was written you knew of any chattel mortgage against that property?

- A. When the policies were written, or the last policy?
Q. No, when the first policies were written?
A. No, sir.

- Q. Now, I will get you to state what you learned about any chattel mortgage against that property thereafter?

- A. By letter from special agent of the Northern Insurance Company, from Denver; Frank Wilson wrote me a letter and asked cancellation on account of the chattel mortgage.

- Q. Was that the first knowledge you had of the chattel mortgage?
A. Yes, sir.

- Q. What, if anything, did you say to Mr. Doepke about it?
A. That letter that was read yesterday was the substance of it. He was in St. Louis, and there was only five days to get the policy.

- Q. Well, I will get that letter.
A. I can tell you the substance of the letter. It is unnecessary to put them to that trouble.

- Q. What was the date of that letter that you wrote?
263 A. Well, now the date I couldn't tell, but the cancellation, if I remember right, occurred in June; either the 22nd of June or the 22nd of July. I wouldn't say which month.

- Q. I will get you to state if after you wrote that letter to Mr. Doepke you saw him back there and you had any conversation of the contents of it?

A. Yes, sir.

Q. Just state what was said by him, and by you, as to the cancellation of the policies?

A. The question arose as to what would happen with the other policies and he told me that Mr. Peters, although the chattel mortgage had been given him, had agreed not to put it on record: he said Mr. Peters agreed not to put it on writing, and I told him if the other companies got next to it they would all cancel.

Q. I will get you to state, at the time that you took over this insurance, all those fourteen policies, whether or not he paid the premium?

A. No, sir.

Q. State what was said between you and him about that at that time?

A. He asked for some time on the premium, and I told him we had to pay the company in sixty days, and we agreed to carry him a little longer for a part of it.

Q. How long did you carry it until you sent to the company about it.

A. After the fire.

Q. I am talking about the insurance company. When did you pay the company?

264 A. Sixty days after the first of the current month in which the policies were written.

Q. How much money did you advance for him to the company?

A. At that time about fifteen hundred and thirty dollars, or forty dollars, less five hundred dollars paid on December. Let's see. Yes, he paid five hundred dollars to us before we paid the company.

Q. They paid five hundred dollars before you paid the company?

A. Yes, sir.

Q. Did you tell him you would pay the company?

A. Yes, sir.

Q. Then, I will get you to state, what, if anything, further you said to him about your paying the company, and about his paying you?

A. Well, I kept after him for the rest of the premiums. We couldn't afford to carry them. Wrote him letters to that effect.

Q. Now, at the time of the fire, how much did he still owe you?

A. Eleven hundred and twenty-four dollars.

Q. When did he pay that?

A. Five hundred dollars on August 16th and six hundred and twenty-four dollars on August 17th, and when it reached our office.

Q. Where was it sent from?

A. St. Louis, Missouri.

Q. I will get you to state, at the time that these policies were taken out on October 5th, 1909, if anything was said to you 265 by him on the subject of shutting down out there?

A. No, sir.

Q. What did he tell you he was doing out there?

A. Mining and milling.

Q. How long did he continue to mine and mill after the policies were issued?

A. About three months and a half.

Q. Now, I will get you to state when these letters, marked Exhibits 16, 17, 18, 19 and 20, came into your possession?

A. When they came?

Q. Yes. When they came into your possession?

A. After the fire. What date I wouldn't mention.

Q. Who handed you those letters?

A. Mr. Doepke.

Q. Where were you when he handed them to you?

A. Sitting at my desk in the office.

Q. I will get you to state what his purpose——

Mr. Fauntleroy (interrupting): Well, I object Your Honor.

Q. What was said at the time, or said before that, on the subject of furnishing you those letters?

A. The idea was to get those letters for me so I could pass them to the company after the fire to show for Mr. Doepke that I had been notified by him by letter.

Q. I will get you to state if ever you received any such letters as these before that from him?

266 A. No, sir.

Q. Who proposed those letters?

A. Mr. Doepke.

Q. Just state when it was and what he said to you when he first made the proposition about those letters?

A. It was sometime after the fire.

Q. Then afterwards he brought in the letters and handed them to you?

A. Yes, sir.

Q. And you turned them over to the company?

A. Yes, sir; filed them and afterwards turned them over to the company.

Q. You keep letter files?

A. Yes, sir.

Q. I will get you to state if you preserve your letters?

A. Every one.

Q. I will get you to state if you have any such letters in your possession as those?

A. No, sir.

Q. Did he ever write you any letters on the subject of vacancy?

A. No, sir.

Q. I will get you to state what he ever said to you about shutting down?

A. He didn't say anything about shutting down until after he had shut down.

Q. How long afterwards?

A. Thirty days after.

Q. I will get you to state what passed between you and him at that time?

267 A. I told him if I notified the companies they wouldn't carry the insurance.

Q. What did he say?

A. He said they would be shut down temporarily.

Q. Did he say about how long he would be shut down?

A. No, sir, not definite. Two or three weeks generally at a time.

Q. Did he mention it to you the other times?

A. Yes, sir.

Q. You didn't inform the company?

A. No, sir.

Q. Why?

A. Because I expected he would start up in a short time, and I didn't want to lose the business and the premiums.

Q. How long did he remain closed down?

A. From the 10th day of January until the day it burned.

Q. Now, you wrote these policies. I will get you to state if that Chilean mill was insured in these policies? Was included in that policy?

A. Yes, sir, subdivision B, under the head of "machinery, main building."

Q. Now, you have seen this. Where is that chattel mortgage? Now, I will get you to state, in looking over this chattel mortgage, state what property included in that chattel mortgage is in that policy?

Mr. Fauntleroy: I think that the instruments will speak for themselves.

268 A. Chilean mill only.

Q. Chilean mill only?

A. Yes, sir.

Mr. Robertson: Where is that proof of loss, Mr. Fauntleroy?

Mr. Fauntleroy: I think you have it.

The Court: They are all alike. You can use one as well as the other.

Mr. Herrington: Well, we have got that identified as an exhibit.

Mr. Robertson: You gentlemen have it.

Mr. Fauntleroy: Take another proof of loss and use it as the same.

Q. Now, I will show you one of the proofs of loss. These proofs of loss were all handed to you?

A. Yes, sir.

Q. Now, I will get you to state—point out the Chilean mill that was in that policy and what was the value of that, according to this claim?

A. The mill, \$4800.

Q. Now, how many times did you ask Mr. Doepke for this money he owed you?

A. Oh, possibly five or six times during the unpaid period.

Q. He always promised to pay you?

A. Yes, sir.

Q. Now, where was that mill located?

A. About two miles north of Cripple Creek.

Q. I will get you to state whether it could be seen from the town?

269 A. No, sir.

Q. What intervened?

A. You mean from the top?

Q. Sir? From the town?

A. Oh, no.

Q. I will get you to state what intervened to prevent it?

A. Quite a mineral hill.

Q. How much higher is that hill than the property?

A. I should say some four or five hundred feet.

Q. That hill was between the town and the mill?

A. And the mill.

Q. And the plant?

A. Yes, sir.

Q. Now, I will get you to state if these companies would have cancelled those policies—

Mr. Fauntleroy (interrupting): We object to that as incompetent, irrelevant and immaterial. Calling for a conclusion and opinion of the witness. This man was the company, and it's hearsay and speculative.

Mr. Robertson: Well, let me get through.

Mr. Fauntleroy: I beg pardon.

Q. I will get you to state how long you have been agent for the company?

A. For this particular company, the Pennsylvania, about five years.

Q. Now, I will get you to state if it was your duty to report that shutting down to the company?

A. Yes, sir.

270 Q. Now, I will get you to state if you had reported it what would have been the result?

Mr. Fauntleroy: Object to that as speculative and calling for the opinion and conclusion of the witness.

Mr. Robertson: Well, you—

Mr. Fauntleroy: Wait until I get through * * * I object to that as calling for an opinion and conclusion of the witness, speculative and not the best evidence. If it is admissible at all it is for the parties who control the company to say what they would do. But this gentleman was the agent of the company, and they can speak only through their acts. It wouldn't be for this man to say what some person might have done.

The Court: I don't see how he would know what would be done.

(By the Court:)

Q. Where did you report to in this company?

A. Chicago.

Q. Well, I will get you to state what was—what you know is the custom of the company in relation to mining property as to allowing it to be shut down?

Objection by Mr. Fauntleroy.

Q. Mining and milling?

Mr. Fauntleroy: Incompetent, irrelevant and immaterial.

Q. And what effect would shutting down *would* have upon it?

Mr. Fauntleroy: Object for the same reasons.

Q. I mean what effect would the knowledge of the fact upon the company have?

271 The Court: It seems to me if there is any definite rule he may state.

Q. I will get you to state if the companies have a fixed rule on the subject? If so, what is that rule?

A. Yes.

Mr. Fauntleroy: We object to that, Your Honor. It is incompetent, irrelevant and immaterial, and parol evidence, and hearsay, and that it can't be introduced for the purpose of varying the conduct of the company as it was done in this case through this witness, unless it was brought to the attention of the plaintiff in this case?

The Court: He may answer.

Q. Now, go ahead and state the rule?

A. The rule is: If the property is idle or inoperative for over thirty days, mining or milling, it would cancel their policy.

Cross-examination by Mr. Fauntleroy:

Q. Who was to do this cancelling out in Colorado?

A. If they wire.

Q. Wire to you?

A. To the agent.

Q. You were the agent?

A. I am one of them.

Q. Well, Kilpatrick and Hanley, and you would cancel it?

A. Yes, sir.

Q. You wrote these policies?

A. Yes, sir.

Q. You had the blank policy there to fill out?

272 A. Yes, sir.

Q. You took the premium?

A. Yes, sir.

Q. You signed your name?

A. Yes, sir.

Q. The company's name?

A. Yes, sir.

Q. The policy provides that it is not valid until countersigned by you?

A. Yes, sir.

Q. Are there any other agents there of this company, any of these fourteen, except yourself? Your agency?

A. No, sir.

- Q. Do you cancel policies yourself? Take them up?
A. For non-payment of premium only.
Q. Why didn't you send—was it your duty to send notice of this Peters mortgage to the company?
A. Yes, sir.
Q. You knew of it, didn't you?
A. Yes, sir.
Q. Why didn't you send it to the company?
A. Protecting Mr. Doeple the same as the people.
Q. How?
A. Protecting him so he would have insurance on the property.
Q. Why didn't you do your duty to the company and protect them instead of Mr. Doeple?
A. I am willing to take the blame for that.
273 Q. Mr. Doeple told you all about the Peters mortgage?
A. No, sir, not until after we found it.
Q. Before the fire you and Doeple talked all about the Peters mortgage?
A. When the policy was cancelled.
Q. That was before the fire?
A. Yes, sir.
Q. You didn't cancel any but the Northern?
A. Yes, sir.
Q. That isn't any of the fourteen here sued on?
A. No, sir.
Q. You cancelled that yourself?
A. Cancelled it by request of the special agent, Frank Wilson.
Q. Where was he when he requested it?
A. He was either in—I think Arizona.
Q. You mean he is adjuster?
A. Well, yes.
Q. The company's special agent is but another name for adjuster?
A. No, they visit our agency when there isn't a fire at all.
Q. Well, we will call him a special agent, then. So he told you to cancel the Northern policy?
A. Wrote me to that effect.
Q. You then knew that the Peters mortgage for twenty-five thousand dollars was against each one of these policies, didn't you?
A. Yes, sir.
274 Q. You knew it was your duty that when that fact was brought to your knowledge to inform the companies?
A. Yes, sir.
Q. In Chicago?
A. Yes, sir.
Q. That was your duty?
A. Yes, sir.
Q. As the agent of the company?
A. Yes, sir.
Q. You was the only representative of any of these companies out there?

A. Yes, sir.

Q. Now, tell the jury, why, with the knowledge of the fact that this mortgage was on, you didn't cancel this policy?

A. I was in no position to lose eleven hundred dollars that I had advanced to the company.

Q. You preferred to sacrifice the company and take your chances of the policies being valid and not telling Doepke that this policy must be cancelled, to losing your money?

A. He didn't lose nothing by the transaction.

Q. Has any of them paid?

A. He has got insurance—he had the policies written for a year.

Q. And these are the same policies that are being sued on that you say he has got?

A. Yes, sir.

275 Q. You understand this company is claiming they are void, don't you?

A. Yes, sir.

Q. Then, why do you sit up and tell the jury he has got insurance when your company is depending against him?

A. He has got the policies.

Q. Why, sure, he has got the paper it was written on?

A. Yes, sir.

Mr. Herrington: That's your question.

Q. We understand. What's amusing you?

A. You are getting mad.

Q. Me? I am as cool as the center seed of a cucumber. You got notice—you knew that you had written fourteen policies, and given them to Mr. Doepke to insure his mill, didn't you?

A. Yes, sir.

Q. You were informed when that this Peters mortgage was on there?

A. Yes, sir.

Q. I say, when? How long before the fire?

A. Oh, well, it was during the time this Northern cancellation. The time of the Fidelity policy.

Q. About how long before the fire?

A. About two months or two and a half.

Q. You cancelled the Northern policy, and immediately wrote another policy for twenty-five hundred dollars, and gave it to him, knowing—(in the Fidelity Phoenix)—knowing that that 276 twenty-five thousand dollar mortgage was on that property?

A. Yes, sir.

Q. And you didn't cancel or object to that mortgage, did you?

Q. Now, why didn't you object to Mr. Doepke to that mortgage and his insurance, if you were going to raise the question afterwards about it?

A. I never raised any question about it.

Q. You never did?

- A. No, sir.
Q. You were the general agent of the company?
A. Yes, sir.
Q. The only representative they had out there?
A. Yes, sir.
Q. Taking premiums?
A. Yes, sir.
Q. Writing and delivering contracts?
A. Yes, sir.
Q. And you being the company you kept quiet?
A. Yes, sir.
Q. When did you next see Doeple after you learned this twenty-five hundred dollar mortgage was on there?
A. I should say within thirty days.
Q. And at least thirty days before the fire?
A. I presume so.
Q. Well, it was a long time before the fire, wasn't it?
277 A. It was about two or two and a half months since I wrote the policy.
Q. Then it was in a month or a month and a half before the fire that you saw Doeple after you knew this mortgage was on there?
A. Yes, sir.
Q. Did you take up that subject?
A. I told him if the companies got on to it they would all cancel.
Q. What did he say?
A. I don't know exactly.
Q. He didn't hide anything?
A. He had nothing to say; he didn't hide it then but I knew of this mortgage.
Q. Let's stick to this. You said you told him that if the companies got on to it they would cancel?
A. That letter says so.
Q. Don't that letter say they might cancel?
A. I think it says they would follow suit.
Q. Now, it was your duty to notify the company of that mortgage?
A. Absolutely?
Q. And you didn't do it?
A. No, sir.
Q. Took no steps at all?
A. No, sir.
Q. And you allowed Doeple to rest in the security and belief that his insurance was all right with that mortgage on it?
278 A. In the same way he led me to believe the mill still—
Q. Didn't you let him rest under the impression and under the belief that his insurance was all right?

Mr. Robertson: We object to that question.

- A. No; absolutely no.
Q. Let's get to the question of premium. Why did you say you didn't notify your company?

- A. Because he owed me.
Q. It was your duty to notify them?
A. Yes, sir.
Q. Under your instructions?
A. Yes, sir.
Q. You didn't ask Doepeke to notify the companies?
A. No, sir.
Q. You didn't want the companies to know it?
A. Not from me.
Q. Well, from anybody?
A. I would have lost my premium.
Q. You didn't want the companies to know it?
A. Not if he was going to start in two or three weeks.
Q. How, if he started in two or three weeks, would that help the mortgage?
A. The mortgage I knew nothing about when it closed down.
Q. Oh, I know, but I am speaking of when you knew about it. How would that help the mortgage?
A. They will not carry mortgaged property, vacant.
279 Q. You didn't tell Doepeke that?
A. He knew it. I told him in that letter that if the companies got next to it they would immediately cancel.
Q. Now, you say that you had paid the company?
A. Yes, sir.
Q. If you had paid the companies, you paid them all the premiums, didn't you?
A. Yes, sir.
Q. How much were the premiums?
A. With the exception of the last policy written, which was not due at the time.
Q. How much had you advanced to the companies?
A. I advanced the amount of the original insurance, and your papers called for about \$1,530.00.
Q. Well, now, how much did you pay the company?
A. About fifteen hundred dollars.
Q. When did you pay them that sum?
A. Sixty days after the first of the current month after they was written.
Q. How long would that be, about, before the fire?
A. That would make the payment on the first of January.
Q. That paid for and on behalf of The Gold Issue Mining and Milling Company all the premiums, so that they owed nothing to the insurance companies?
A. Yes, sir.
Q. That's right?
280 A. Yes, sir.
Q. Now, you explain: If you had paid for Doepeke all the premiums on all of these policies to the companies so that The Gold Issue Mining and Milling Company owed nothing to the companies on the premiums, why did you wire him on August 15th, 1910, a few days after the fire "mail draft for your protection, eleven thousand and twenty-four dollars"?

A. I simply took the advantage of getting my money out of him.
Q. You tell this court and jury what protection there a draft would have protected him on as far as the policies were concerned?

A. It protected me.

Q. But you say "mail draft" for his protection?

A. No, but I got the draft.

Q. Oh, yes; you got everything. We are trying to get ours.

A. I wasn't in a position to lose that money at that time.

Q. But you tell me why, if the companies had received all their money—you were then the agent of that company?

A. Yes, sir.

Q. At the time this telegram was sent you were then the agent and representative of that company out in Cripple Creek?

A. Yes, sir.

Q. Doeppke didn't owe a dollar to the insurance companies?

281 A. No, sir.

Q. Then what did you mean by telling him that?

A. It was a ruse to get my money.

Q. Is that a trick?

A. No, sir; he is the boy that's been doing the trick.

Q. We will let the jury say as to that. You have got everything up to date from him, and there he hasn't got a thing.

Mr. Herrington: Well, Your Honor, we object to that and ask that it be stricken out.

The Court: Motion to strike out sustained.

Q. What do you mean by ruse?

A. Getting your money.

Q. In any way?

A. That's a legitimate way, isn't it?

Q. What?

A. Getting it by telegraph.

Q. Yes, if it is by a truthful telegram.

A. He owed it to me.

Q. Why didn't you telegraph to him saying that he owed you that money and please to forward it?

A. Because I wouldn't get it.

Q. He sent it to you, anyhow.

A. That telegram brought it.

Q. What do you mean by ruse?

A. It's a common term that's used in the State of Colorado.

Q. Among the insurance companies and their agents?

282 A. Yes.

Q. What definition do they put on to it out there in Colorado?

A. If I had the learning you have got I could tell you.

Q. I am asking you what? You used that word. You had that learning. Now, what did you mean by "ruse"?

A. That telegram expresses it, don't it?

Q. Was that telegram true that you sent?

A. Was it true?

- Q. Yes.
A. What do you mean?
Q. "Mail draft for your protection"?
A. It is true he owed me.
Q. You didn't say that.
A. He knew it.
Q. So, why did you send the telegram at all?
A. He knew the amount.
Q. Why did you send the telegram at all?
A. To get my money.
Q. Now, why, they, did you put in "mail draft for his protection"? What protection was he to get if he mailed you the money on these policies?
A. There might be a mistake about that telegram.
Q. Oh, you think—
A. I haven't said so. It might be for my protection.
Q. Did you send that telegram?
A. I sent a telegram.
283 Q. Is that the telegram you sent?
A. I couldn't tell exactly.
Q. A little while ago you said it was. Will you swear that you put in any telegram "mail draft for my protection"?
A. No, sir; not that I sent.
Q. But that's the telegram that you sent?
A. Yes, sir.
Q. And you think, now, the telegraph company might be lacking?
A. They have. They have made mistakes.
Q. Out in Colorado?
A. Yes, sir; and in Missouri. I have got one in my pocket now, a mistake in signature, at Mexico, Missouri.
Q. Pretty bad lot here in Mexico?
A. Oh, they are pretty decent.
Q. Well, now, Doeple never hid from you the fact that there was a twenty-five thousand dollar mortgage, did he?
A. Yes, sir.
Q. After the fire?
A. No, sir.
Q. After the cancellation of this policy?
A. No, sir.
Q. Didn't he tell you that that mortgage had been paid?
A. No, sir.
Q. Didn't?
A. No, sir.
Q. This isn't a ruse you are running in on us, now, is it?
284 A. No, sir; don't get foxy, now.
Q. You have got foxes out in Colorado, too?
A. Yes, sir; and some in Missouri.

Mr. Herrington: Oh, that takes too much time, these side issues are not important.

Q. Mr. Kilpatrick, how far is this mill from your offices in Cripple Creek?

A. From the office, I should say two miles and a quarter.

Q. You were familiar with it?

A. Very well.

Q. Frequently went out there?

A. No.

Q. Occasionally?

A. No.

Q. Never went out?

A. Went out before the mill started, and went once afterwards.

Q. And once afterwards?

A. Yes, sir.

Q. This policy—before that: These letters we fortunately have found them. Now, you say that you told Mr. Doeple that if the other insurance companies, that is, these fourteen that are now being sued, other than the Northern—found out that this mortgage was on that they would cancel the insurance?

A. That they would follow suit.

Q. Well, follow suit; that is, that they would cancel the policies?

A. That they would follow suit.

285 Q. What did you mean by that?

A. Cancel.

Q. That they would cancel?

A. Yes, sir.

Q. Now, is this your letter?

A. And my signature.

Q. Is it?

A. Yes, sir.

Q. You are certain there are no words wrong in that?

A. They might be mis-pelled.

Q. And otherwise you are willing to stand by what's in this letter?

A. Yes, sir.

Q. (Reading:) Addressed "J. F. W. Doeple, St. Louis Missouri; dear sir, Yours with policy enclosed received today for which we thank you." What do you mean by "yours with policy enclosed"?

A. His letter.

Q. Where is that letter?

A. I presume in my file.

Q. Have you got it?

A. Yes, sir.

Q. Can you produce it?

A. Not without going for it or sending for it, but it's on file.

Q. Where?

A. In Cripple Creek.

Q. That is, if we adjourn this case and go out to Cripple Creek, you will get it?

286 A. You needn't for my benefit.

Q. You haven't got it here?

A. No, sir.

Q. You haven't any of his letters here?

A. No, sir.

Q. Did he ever write you any letters?

A. Yes, sir.

Q. He did?

A. Yes, sir.

Q. How many?

A. I never counted them, numerous letters.

Q. And you haven't got any of them here?

A. No, sir.

Q. When have you seen those letters last, these numerous letters?

A. Never since I filed them. Those were the last letters handed to me.

Q. I didn't ask that?

A. I have had no letters since immediately after the fire.

Q. That fire was the 13th of August, 1910, almost two years ago. You haven't looked at them since?

A. No, sir.

Q. When did you go through and examine the correspondence you had with Mr. Doeple?

A. I haven't done it yet.

Q. You would receive them and file them?

A. Yes, sir.

Q. What would he write you about?

A. Various things. Some in answer to my appeals for money.

287 Q. What of the others?

A. I don't know that there were any others.

Q. Never wrote anything except a Macedonian wail for money?

A. That's about all.

Q. Did he ever write or did you ever have any claim about this insurance other than for money?

A. No, sir.

Q. Never at all, but he wrote you numerous letters for money?

A. I wrote him numerous letters and he generally answered them.

Q. Oh, on this question of money. Now, you go on and say in this letter "the cancellation of this policy was occasioned by the fire." This letter was written July 21st, 1911?

A. Yes, sir.

Q. You knew then all about the mortgage?

A. Yes, sir.

Q. (Reading:) "The cancellation of this policy was occasioned by the filing of that chattel mortgage by Mr. Peters, and the rest of the companies may follow suit, as when one starts they generally all go." Why didn't you tell him they would follow suit as their instructions were to cancel?

A. I might have used a different word. In my mind I knew they would cancel.

Q. Mr. Doeple was fitting in your plan?

A. No, but he knew what was in that letter.

Q. "They may follow suit"?

288 A. That was sufficient notice that they would do it.

Q. And that's the only explanation you have got to give to this jury of it?

A. Of what?

Q. Of what we are talking about, that you told him that the companies would cancel?

A. Why, he knew they would cancel.

Q. He says he didn't. How do you know he knew it. Tell the jury. How do you sit up there and tell the jury that he knew they would cancel.

A. Suppose you and I was going to California. Would it be necessary to tell you that you would have to have a ticket. You would know that much, wouldn't you? That "may," or "would," may be a clerical error.

Q. I see.

A. There is other words. If I had studied law like you and Mr. Doeple, I might have got it right.

Q. And you think the trip to California explains what you have got to explain to the jury?

A. Yes, sir.

Q. What you really meant to say in this letter was that they would follow?

A. You can't tell what I wrote.

Q. I am asking you whether you intended to put in the letter "they would"?

A. Yes, sir.

Q. So you didn't really express the idea you meant to convey?

A. I don't know as I did.

Q. How did you expect Doeple to know what the companies would do if you didn't express it to him? Now, coming back from our excursion to California. This policy was written—it is dated October 5th, 1909, isn't it?

A. Yes, sir.

Q. That's the day it was written and delivered?

A. I don't know as it was delivered that day.

Q. We will assume it was delivered that day. You don't know that it was delivered any other day, do you?

A. You don't assume very much, I notice.

Q. Where were you born? I want to know.

A. North of Ireland.

Q. And how long have you lived out in Colorado?

A. Twenty-nine years.

Q. North of Ireland?

A. Yes, sir.

Q. Twenty-nine years?

A. You will get my age first thing you know.

Q. No, we don't want your age. Some things we don't want to know about you?

A. I have got nothing I am ashamed of.

Q. Not even your ruses for Doeple?

A. That's a new word for Missouri.

Q. Now, how long after—Before I get to that: What do you do when you take up policies for non-payment of premiums?

A. Cancel.

Q. Just tell us how you do?

A. Take up the policy and return the premium and send it to the company.

290 Q. You go to the agent and tell him you want to cancel the policy?

A. You mean, to the insured.

Q. You go to the insured and tell him you want to cancel the policy?

A. Yes, sir.

Q. You cancel it, and you demand of him and receive the unearned premium?

A. He receives it from me.

Q. You take the policy and put it into your North of Ireland pocket?

A. Yes, sir.

Q. How do you pay that unearned premium?

A. By check.

Q. Individual check?

A. Yes, sir.

Q. You take the policy up and send it back to the company?

A. Yes, sir.

Q. You have been doing that right along?

A. Yes, sir.

Q. That's your course of business with the companies and with the insured?

A. Yes, sir; when occasion demands.

Q. Oh, I understand that. Now, this policy is dated October 5th, 1909. How long after that did you learn that this building was vacant?

A. After they closed down.

Q. Well, now, how long after October 5th, the date of the policy, would that be?

291 A. Well, I should say a few days after January 10th, when they closed.

Q. A few days after January 10th you knew that the building was shut down?

A. Yes, sir.

Q. Why didn't you cancel the policies and return the unearned premium, if you was going to claim the policy was void on that account?

A. It wouldn't have been void if he had started the mill when he agreed to.

Q. You knew that it never had been opened up again?

A. Yes, sir.

Q. You knew that it *was* remained idle and shut down from early in January until the 13th of August, the date of the fire?

A. Yes, sir.

Q. After the thirty days why didn't you cancel that policy and return the unearned premium?

A. He owed me too much.

Q. You never said a word to him about these policies being cancelled or void?

A. No.

Q. No. You never offered to return him a cent of the premium?

A. He owed me.

Q. Why didn't you have the company return him the unearned premium which he had paid them through you, as you claim? Just explain that to the jury?

A. I told you I wanted to protect him. I knew if they were cancelled he couldn't get any more.

292 Q. In other words, you wanted these policies to go on?

A. And be valid, yes, sir.

Q. So if he burned he would get his money?

A. Yes, sir.

Q. That's correct?

A. Yes, sir.

Q. And you didn't believe and didn't mean that the policy should be avoided by the mill being shut down for this twenty-five hundred dollar mortgage, did you?

A. In the first place—

Q. Answer the question: Do you intend these policies to be void by reason of those facts?

Objection by Mr. Robertson: That's a mere conclusion.

The Court: I think it's proper.

Mr. Herrington: His intention can't bind the company.

The Court: That's true, but it's cross examination. He may answer.

To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

(Question is read by the stenographer.)

Q. That is, that the mill being shut down for more than thirty days, and the mortgage claimed on it?

Mr. Herrington: Same objection.

The Court: Objection overruled.

To which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

293 A. Did I expect?

Q. Did you intend those policies to be void?

A. No, sir.

Q. Now, you and Mr. Doeple talked frequently about the mill being idle?

A. Very often.

Q. You knew, and he told you, that it would have to become idle because they couldn't get coal?

A. For a short time.

Q. I say he told you that?

A. Yes, sir.

Q. Didn't he also tell you he would have to build a tramway and for that reason the mill would have to shut down?

A. He did build the tramway, but I don't remember that he told me that.

Q. You knew while the mill was shut down they were building a service tramway to get coal from the Midget Mine?

A. They were running when the tram was built.

Q. That was the aerial tram, wasn't it?

A. Yes, sir.

Q. That isn't the one we are talking about?

A. That's all I know of.

Q. Didn't he tell you he would have to build a service tramway?

A. This is a service tramway.

Q. He never kept from you the fact, or tried to hide it, that he was shut down?

A. No.

294 Q. You knew it right along?

A. Yes, sir.

Q. You never notified the company?

A. No, sir.

Q. Why?

A. In order to protect him. If he had started at the time he said, why there would have been nothing to it. The policies would have been in full force and operation. If he had notified me that that property had been closed for ninety days at a time the company would have been notified.

Q. Notwithstanding the fact there was a twenty-five hundred dollar mortgage you kept from them to protect your premiums?

A. I didn't know anything about the mortgage at the time, or didn't until July 22nd.

Q. Now, Mr. Kilpatrick, there is another little piece of territory I want to get over with you: I understand you to say, that if the companies had known of this twenty-five thousand dollar mortgage they would have cancelled the insurance?

A. Yes, sir.

Q. And you wouldn't have written it, would you?

A. No, sir.

Q. Why did you write the Fidelity Phenix insurance policy for twenty-five hundred dollars on it when you knew the twenty-five thousand dollar mortgage was on it?

A. That's the difference between one policy and fifty thousand dollars.

295 Q. This is the Fidelity and Phenix Insurance Company policy that you wrote?

A. Yes, sir.

Q. That's your signature?

A. Yes, sir.

Q. You wrote that on July 22nd, 1910?

A. Yes, sir.

Q. You wrote this policy to take the place of the Northern policy?

A. Yes, sir.

Q. Which was cancelled by reason of the twenty-five thousand dollar mortgage?

A. Yes, sir.

Q. Now, why do you say that the companies wouldn't have written this policy if they had known of that?

A. I expected nothing else. He was entitled to thirty days. I expected to cancel it after that.

Q. How?

A. If the companies got on to it.

Q. Oh, I see. But why did you write this policy July 22nd, 1910, the Fidelity and Phenix, after you knew of the twenty-five thousand dollar mortgage, if your instructions were to the contrary?

A. Keep the right foot.

Q. Why did you want him to have a void policy?

A. I didn't consider it that way.

Q. Don't this policy provide if the subject of insurance be personal property and become encumbered by chattel mortgage it is void? Why did you write a policy which upon its face was void, and didn't put on a consent for the twenty-five thousand dollar mortgage?

A. I should have done it.

Q. Why didn't you?

A. I don't know.

Q. You should have done it?

A. Yes, sir.

Q. You took his money and give him a policy for twenty-five hundred dollars insurance on July 22nd, 1910, knowing by the face of it that it was void?

A. I didn't take much of his money when that policy was written. He owed me eleven hundred dollars.

Q. He had already paid you five hundred?

A. Yes, sir. If I had cancelled this insurance—what's your name? LaFollette?

Q. No.

A. If I had cancelled this insurance at the time he closed down, giving him the thirty days under his policy and the vacancy it would have earned five hundred and fifty-five dollars and fifty-five cents pro rata.

Q. I want you to explain to the jury why you wrote him a policy and afterwards collected money—?

A. That's one.

Q. What's the other?

A. I wanted to get my money out of the business before I notified. I wasn't in a position to lose it, and I couldn't get it from the companies.

Q. So, that, rather than incur the liability yourself, you were sending him policies that you knew on the face were void?

297 A. I did not.

Q. Well, you gave him this policy?

A. Yes, sir.

Q. You gave it to him at a time when you knew this twenty-five thousand dollar mortgage was on there?

A. Yes, sir.

Q. You knew by the very terms of the policy that it was void?

A. If I knew as much about mortgages as I do since I have been in court, I wouldn't have done it.

Q. Didn't you know it was void?

A. Yes, sir.

Q. How could any increased mortgage help you, then? You thought if you got your money you would let him take his chance on collecting it?

A. He let me take my chance.

Q. And you let him take his chance?

A. Dog eat dog.

Q. You have got all your money?

A. Yes, sir.

Q. And the companies have got everything that was coming to them?

A. Yes, sir.

Q. And the only thing that remains is for us to get what's coming to us, isn't it?

A. Yes, sir.

Q. That's all.

Mr. Fauntleroy: I want to introduce in evidence in connection with this witness' testimony this telegram.

The Court: That's exhibit number what?

298 Mr. Fauntleroy: No. 3.

The Court: It may be admitted in connection with the cross examination.

Exhibit 3 is in words and figures as follows, to-wit:

"lloks xi 10.

CRIPPLE CREEK, COLO., Aug. 15, '10.

J. F. W. Doeple, Mercantile Bldg., St. Louis, Mo.:

Mail draft for your protection eleven hundred twenty-four dollars.

KILPATRICK & HANLEY."

Mr. Herrington: I understand counsel for the plaintiff will admit that on the 5th day of October, 1910, the plaintiff—the defendant company, the Pennsylvania Fire Insurance Company, tendered to the plaintiff company the sum of twenty-four dollars and twelve cents, amount of the premium, and five dollars and ninety-three cents, the amount of the interest, to the plaintiff company as the return premium, and on that day—and the tender was refused.

Mr. Fauntleroy: I don't admit that that was the correct amount. You have got the benefit, whatever it is. I admit that that act took place.

The Court: Tender of the specific amount named?

Mr. Fauntleroy: Yes, sir; and that it was refused by the plaintiff.

299 Mr. Herrington: And at the same time the defendant denied all liability in the case.

Mr. Fauntleroy: What's that date?

Mr. Herrington: October 5th, 1910. And, furthermore, that the same amount has been tendered into court, and is with the clerk to keep the tender.

Mr. Robertson: That's agreed on, is it?

Mr. Herrington: Yes, sir.

This was all the evidence introduced by the defendant in chief.

Mr. Fauntleroy: I think Exhibits 6 and 7 have been offered in evidence. I want to offer them.

The Court: My impression was they were read.

Mr. Fauntleroy: Exhibit 6, letter of July 11th, 1910, signed by Kilpatrick and Hanley, and Exhibit 7, of July 21st, 1910.

The Court: You offer them on the theory that you intended to offer them in the first place?

Mr. Fauntleroy: If I hadn't already offered them.

The Court: They will be considered in evidence as evidence in chief.

Exhibits 6 and 7, admitted in evidence, are in words and figures as follows, to-wit:

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"EXHIBIT 6."

J. H. Lenehan, Gen'l Agent.

C. R. Street, Ass't Gen'l Agent.

Phenix Insurance Company of Brooklyn, N. Y.

Kilpatrick & Hanley, Agents, Cripple Creek, Colo.

Western and Southern Department, Chicago.

July 11th, 1910.

The Gold Issue M. & M. Co., St. Louis, Mo.

GENTLEMEN: Will you please forward to us at once, Northern Policy, No. 1107093 for cancellation, this is ordered done by the company owing to the fact that a mortgage has been placed on record against your company.

Kindly send the policy by return mail and we will write it in another company and send the policy to you.

Kindly inform us when you expect Mr. Döpke back from New York.

Please do not delay this matter as we must send the cancelled policy to the company at once as per their request.

Yours very truly,

KILPATRICK & HANLEY, Agts.

Endorsed on letter: "Rec'd July 19, 1910."

"EXHIBIT 7."

R. Emory Warfield, President.
 Joseph McCord, Vice-Pres. & Sec'y.
 Charles W. Higley, General Agent.
 Fred A. Hubbard, Ass't Gen'l Agent.

Western Department,
 Hanover Fire Insurance Co. of New York,
 1004 The Temple, La Salle & Monroe Sts., Chicago, Ill.
 Kilpatrick & Hanley, Agents, Cripple Creek, Colo.

Mr. J. F. W. Doeple, St. Louis, Mo.

July 21st, 1910.

DEAR SIR: Yours with policy enclosed was duly received today for which we thank you.

The cancellation of this policy was occasioned by the filing of that chattel mortgage by Mr. Peters and the rest of the companies may follow suit as when one starts the generally all go.

Now regarding the payment of the premium on these policies, it seems to us that it is up to Mr. Peters to pay this premium if he wants the protection and since he is the mortgagor it is nothing more than right for him to send this premium to us, we do not feel that we want to protect his interests and hold the sack at the same time, he is in a position to advance this money and we have done our duty by the company in carrying it as long as we have even going 302 so strong as to borrow the money from the bank here to pay the premiums to the companies.

We want you to take this matter up with Mr. Peters upon receipt of this letter and advise us by return mail what we will do, after which we will decide on our line of action, unfortunately for us we are not in a position to carry an account as large as this one without embarrassing us.

We will look for a reply by return mail.

Yours truly,

KILPATRICK & HANLEY.

This was all the evidence introduced in the case.

Thereupon the defendant prayed the court to give to the jury the following instruction, it being a demurrer to the evidence:

Demurrer at Close of all Evidence.

"GOLD ISSUE, &c., Co.
 vs.
 PENN. FIRE INS. CO.

March 15, 1912.

At the close of all of the evidence the court instructs the jury that under the pleadings and the evidence the jury will return a verdict for the defendant."

Which the court refused to give, to which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

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Plaintiff's Instructions.

Thereupon the court at the instance and request of the plaintiff gave to the jury the following instructions:

1.

"GOLD ISSUE MINING & MILLING COMPANY
v.
INSURANCE COMPANY.

Even though you may find and believe that Joseph Peters had a mortgage on the insured property, or any of it; yet if you find and believe from the evidence that the witness, Mr. Doepke, representing the plaintiff, as its president, informed Kilpatrick and Hanley of said mortgage before the fire, and if you further find from the evidence that they, Kilpatrick and Hanley, were the general agents of the defendant, who issued the policy to plaintiff, and that they made no objection to said Joseph Peters' mortgage, and if you further find that that mortgage and the note it was given to secure was paid in full before the fire and loss in question, even though it was not released of record, then you are instructed that you may find the defendant waived its right to object to the mortgage, and you can find that the mortgage in question would be no defense to plaintiff's recovery in this case."

2.

"GOLD ISSUE MINING & MILLING COMPANY
v.
INSURANCE COMPANY.

If you find and believe from the evidence that before the fire the firm of Kilpatrick and Hanley knew and were informed by J. F. W. Doepke, the president of plaintiff, of the existence of the 304 mortgage before the fire which was held by Joseph Peters, and that they were the general agents of the defendant insurance company, who issued the policy sued on, and that they made no objection to the mortgage and did not cancel the policy sued on or offer to return the unearned premium, if any, which defendant had been paid for the policy, and if you further find that before the fire and loss in question, the said mortgage had been paid in full and cancelled by Joseph Peters; then you are instructed that the prior existence of said mortgage would be no defense to plaintiff's recovery in this suit, even though such release was not made of record."

3.

**"GOLD ISSUE MINING & MILLING COMPANY
v.
INSURANCE COMPANY.**

If the jury find and believe from the evidence in this case that the deed of trust or mortgage which Lawrence McDaniel held and which is recorded in Book 116, at page 238, of the records of Teller County, Colorado, had been paid to and surrendered and cancelled by McDaniel to the Gold Issue Mining & Milling Company, and that the note and debt, for which said deed of trust or mortgage was given to secure, had been paid to and cancelled and surrendered by McDaniel before the issuance of the policy sued on in this case, then you are instructed that such deed of trust or mortgage would be no defense to a recovery in this case on the part of the plaintiff, even though said deed of trust or mortgage may not have been released or satisfied of record and the formal release thereof was not made upon the record till after the fire."

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4.

**"GOLD ISSUE MINING & MILLING COMPANY
v.
INSURANCE COMPANY.**

One of the defenses in this case, which the Insurance Company sets up, is that plaintiff in making proofs of loss, well knowing that it had not suffered a loss of \$9,000.00 of gold in process, yet, notwithstanding that fact, knowingly and fraudulently made oath in its proof of loss that it had sustained a loss of \$9,000.00 of gold in process, by reason of the fires. You are instructed that under the law and the evidence in this case, even though you may find and believe from the evidence that plaintiff did make in its proofs of loss claim that it had suffered a loss by said fire of \$9,000.00 of gold in process, and that such statement was false, yet, you are instructed that a mere false statement made by plaintiff to that effect would not of itself avoid the policy. Before you can find for the defendant upon any such claim, you must find and believe from the evidence, and the burden of proving this is upon the defendant, that if any such statement was made by plaintiff and that it was false, you must further find that the plaintiff knowingly and intentionally made such false statement for the purpose of deceiving the Insurance Company. A mere false statement innocently made or believed in by the party making it, if not made knowingly and intentionally and for the purpose of deceiving the Insurance Company, will not avoid the policy."

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5.

"GOLD ISSUE MINING & MILLING COMPANY
v.
INSURANCE COMPANY.

Even though you may find and believe from the evidence in this case that the plaintiff did make false statements in its proofs of loss by claiming or asserting therein that it had suffered a loss of \$9,000.00 on gold in process, yet, if you find and believe from the evidence in this case that plaintiff or the party making the proofs of loss for and on behalf of plaintiff, believed the statements in regard to such matters to be true when such statements were made, and that such party did not have any intention of deceiving defendant, then and in such case, if you so find the facts to be, you are instructed that even though such statements may have been false or untrue in point of fact, yet, such false statement if innocently made, would not be any defense to a recovery upon the policy in this case."

6.

"GOLD ISSUE MINING & MILLING COMPANY
v.
INSURANCE COMPANY.

If you find and believe from the evidence in this case that the plaintiff applied to Kilpatrick and Hanley, and that they were the general agents of the defendant Insurance Company, and further find that they then and there had authority to fill out, make, execute and deliver policies of insurance and receive the premiums therefor for and on behalf of the defendant, and that they did make, execute and deliver to the plaintiff the policy sued on, and that before the bringing of this suit plaintiff made full payment of all fees and taxes authorized by the law of Colorado to the Secretary of State, and that thereupon and before the bringing of this suit the Secretary of State of the State of Colorado did duly issue to plaintiff a certificate of authority to do business in the State of Colorado, and to sue and be sued in the State of Colorado, then and in such case if you so find the facts to be, you are instructed that the defendant cannot avail itself, as a defense to this action, of the fact that the plaintiff had not taken out such license and paid such fees to the State of Colorado, at the time of the issuance of its policy to plaintiff, or the occurrence of the fire in question, or prior to the time plaintiff attempted to acquire title to the land on which the buildings were situated and upon which the policy was written."

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7.

**"GOLD ISSUE MINING & MILLING COMPANY
v.
INSURANCE COMPANY.**

Even though you may find and believe from the evidence in this case that the mill in question was shut down and remained idle for more than thirty days without written consent of defendant endorsed upon the policy, therefor, yet if you find and believe from the evidence that Kilpatrick and Hanley were the general agents of defendant and that they knew and were informed by Mr. Doepke, representing the plaintiff, of that fact, before the fire and if you find that Kilpatrick and Hanley made no objections thereto, and did not cancel the policy or offer to return the unearned premium, if any, before the fire, then you can find
 308 that the defendant waived the provisions of the policy requiring written permission therefor to be endorsed upon the policy, and in such events, if you so find the facts to be, the fact that the plant was shut down and remained idle for more than thirty days would not render the policy void.

8.

"The jury are instructed that this suit was commenced and brought on June 6, 1911."

The defendant objected to each of the above and foregoing instructions, numbered from 1 to 8, inclusive, given by the court at the instance and request of the plaintiff, but its objections were overruled, to which ruling of the court the defendant then and thereby its counsel duly excepted and saved its exceptions.

Defendant's Given Instructions.

Thereupon the court at the instance and request of the defendant gave to the jury the following instructions:

I.

"The court instructs the jury that the plaintiff cannot recover for loss to the Refining and Assay Building and the machinery therein, which had insurance thereon to the amount of \$550.00, nor for the office and laboratory which had insurance thereon to the amount of \$100.00, for the reason that said building, machinery, office and laboratory were not damaged by the fire, which in this case is 1.3 per cent of the amount in the policy sued on."

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II.

"The court instructs the jury that you will disregard all testi-

mony given in the case in relation to the care of any of the property after the fire and disregard any statement made by any witness that the firm of Kilpatrick and Hanley refused permission for plaintiff to look after or take charge of any of the property after the fire."

X.

"The court instructs the jury that if you believe from the evidence in this case that the plaintiff in making its proofs of loss, knowingly made a greater claim for "Gold in Process" than the actual damage thereto, then the plaintiff cannot recover in this case."

Defendant's Modified Instructions as Asked.

The defendant also prayed the court to give to the jury the following instructions:

III.

"The court instructs the jury that by the terms of the policy sued upon, it is provided that if the subject of insurance be personal property and be or become encumbered by chattel mortgage and that the defendant after said policy was issued, placed a chattel mortgage upon the chillian mill in said policy insured, then said policy as to said chillian mill became and is void and the plaintiff cannot recover for damage to the same by fire in this action, unless the defendant waived the conditions of said policy as to said chattel mortgage, and you are further instructed that although the
310 agents, Kilpatrick & Henley became aware of said chattel mortgage thereafter, and called the attention of the same to Doepke, the president of the plaintiff and gave the said Doepke to understand that if such fact became known to the defendant, it would cancel said policy and gave him further to understand that they were not going to report the fact of said chattel mortgage to said defendant for fear the same would be cancelled and that the said Doepke acceded thereto, then there was no waiver of said condition of said policy and said mortgage debt was not paid off till after the fire the same became null and void as to said chillian mill included in said chattel mortgage and the plaintiff cannot recover for damage to the same in this action."

IV.

"The court instructs the jury that by the terms of the policy sued upon, it is provided that if the main building and Edwards Roaster, parts of the plant insured by said policy should remain idle or not in operation for a period of more than 30 days without the written consent of the defendant, then the policy should be

void and the court instructs the jury that if you find from the evidence in this case that said main building and Edwards Roaster were allowed to remain idle and not in operation for a period of more than 30 days without the written consent of the defendant, then the policy did become void and the plaintiff cannot recover herein at all, unless the defendant waived that condition and provision of the policy, and you are further instructed that if
311 you find from the evidence in this case that said main building and Edwards Roaster did remain idle and not in operation for a period of more than 30 days, with the knowledge of the said agents, Kilpatrick & Henley, and that these said agents, or, either of them, told Doeple, the president of the plaintiff, that if said defendant were aware of the fact that said main building and Edwards Roaster did remain idle and not in operation for a period of more than 30 days, it would cancel said policy, but that they were not going to inform the defendant of said idleness and want of operation for said period, for fear said policy would be cancelled and the said Doeple acceded thereto, then there is no waiver of said conditions of said policy and the plaintiff cannot recover and you will return a verdict for the defendant."

V.

"The court instructs the jury that if you believe from the evidence in this case that the said agents, Kilpatrick & Henley, issued 14 insurance policies upon the property described in defendant's policy on the 5th day of October, 1909, and that the premiums thereon amounted to something like \$1,500.00, and that the said agents at the request of plaintiff's president advanced about \$1,100.00 of said premiums for the plaintiff to the said companies and that thereafter the said plaintiff put a chattel mortgage on part of the insured property and that it violated the 30 day clause against idleness and not being in operation as defined to you in another instruction and that said plaintiff failed to pay the said agents said
312 premiums advanced and delayed the payment thereof from time to time to the said agents, or any considerable portion thereof, so that it became to the interest of said agents not to inform this defendant of said chattel mortgage and the violation of said 30 day idle and inoperative clause, so that the interests of the said agents became and were adverse to this defendant as to said violation of said policy and the same was done for the benefit of the plaintiff and said plaintiff had knowledge thereof through its president Doeple, then the conditions of said policy as to said chattel mortgage and to said idleness and inoperative clause were not waived by this defendant and it will be your duty to find in favor of the defendant on account of the effect of said clauses in said policy."

IX.

"The court instructs the jury that there is an item of \$9,000.00 in said policy of insurance on 'Gold in Process.' Now, if you believe

from the evidence in this case that plaintiff did not have as much as \$9,000.00 worth of 'Gold in Process' at the time of said fire, then the plaintiff cannot recover the full proportionate part in this policy for said item of insurance and you are further instructed that the said policy of insurance provides that this defendant shall not be liable for any loss caused by any neglect of the plaintiff to use all reasonable means to save and preserve the property at and after the fire.

Now, if you believe that there was ore and other material composing Gold in Process remaining after the fire and the plaintiff through its neglect did not save the same when it could have 313 done so, or if any of it after the fire was lost by wind blowing it away, then the plaintiff cannot recover for any part of such property blown away by the wind or any of the same, that it could by reasonable care on its part, have saved."

Which said instructions, Nos. III, IV, V and IX, the court refused to give as prayed for by the defendant, but did give after changing, modifying and interlining said instructions so as to read as follows:

Defendant's Modified Instructions as Given.

III.

"The court instructs the jury that by the terms of the policy sued upon, it is provided that if the subject of insurance be personal property and be or become encumbered by chattel mortgage and that the defendant after said policy was issued, placed a chattel mortgage upon the chillian mill in said policy insured, then said policy as to said chillian mill became and is void and the plaintiff cannot recover for damage to the same by fire in this action, unless the defendant waived the condition of said policy as to said chattel mortgage, and you are further instructed that although the agents, Kilpatrick and Hanley, became aware of said chattel mortgage thereafter, and called the attention of the same to Doeple, the president of the plaintiff and gave the said Doeple to understand that if such fact became known to the defendant, it would cancel said policy and gave him further to understand that they were not going to report the fact of the said chattel mortgage to said defendant for fear the same would be cancelled, then there was no waiver 314 of said condition of said policy and said mortgage debt was not paid off till after the fire the same became null and void as to said chillian mill included in said chattel mortgage and the plaintiff cannot recover for damages to the same in this action. Provided you further believe from the evidence that said Doeple for the plaintiff company agreed and consented that said agents Kilpatrick & Hanly should conceal from the defendant company the fact that such chattel mortgage had been placed on said chillian mill in order to prevent a cancellation of the policy on account of said chattel mortgage."

IV.

"The court instructs the jury that by the terms of the policy sued upon, it is provided that if the main building and Edwards Roaster, parts of the plant insured by said policy should remain idle or not in operation for a period of more than 30 days without the written consent of the defendant, then the policy should be void and the court instructs the jury that if you find from the evidence in this case that said main building and Edwards Roaster were allowed to remain idle and not in operation for a period of more than 30 days without the written consent of the defendant, then the policy did, become void and the plaintiff cannot recover herein at all, unless the defendant waived that condition and provision of the policy, and you are further instructed that if you find from the evidence in this case that said main building and Edwards Roaster did remain idle and not in operation for a period of more than 30 days, with the knowledge of the said agents, Kilpatrick & Henley, and that these said agents, or either of them, told Doeple, the president of the plaintiff, that if said defendant was aware of the fact that said main building and Edwards Roaster did remain idle and not in operation for a period of more than 30 days, it would cancel said policy, but that they were not going to inform the defendant of said idleness and want of operation for said period, for fear said policy would be cancelled, then there is no waiver of said conditions of said policy and the plaintiff cannot recover and you will return a verdict for the defendant.

If you further believe from the evidence that said Doeple for the plaintiff company agreed and consented that said agents Kilpatrick and Hanly should conceal from the defendant company the fact that the main building and roaster was idle and not in operation in order to prevent a cancellation of the policy on account of the mill and roaster being idle and not in operation."

V.

"The court instructs the jury that if you believe from the evidence in this case that the said agents, Kilpatrick & Hanley, issued 14 insurance policies upon the property described in defendant's policy, on the 5th day of October, 1909, and that the premiums thereon amounted to something like \$1,500.00, and that the said agents at the request of plaintiff's president advanced about \$1,100.00 of said premiums for the plaintiff to the said companies and that thereafter the said plaintiff put a chattel mortgage on part of 316 the insured property and that it violated the 30 day clause against idleness and not being in operation as defined to you in another instruction and that said plaintiff failed to pay the said agents said premiums advanced and delayed the payment thereof from time to time to the said agents, or any considerable portion thereof, so that it became to the interest of said agents not to inform this defendant of said chattel mortgage, and the violation of

said 30 da idle and inoperative clause, so that the interests of the said agents became and were adverse to this defendant as to said violation of said policy and the same was done for the benefit of the plaintiff then the conditions of said policy as to said chattel mortgage and to said idleness and inoperative clause were not waived by this defendant and it will be your duty to find in favor of the defendant on account of the effect of said clauses in said policy.

Provided you further believe from the evidence that said Doeplek for the plaintiff company agreed and consented that said agents Kilpatrick and Hanley should conceal said conditions from the defendant company in order to prevent a cancellation of the policy."

IX.

"The court instructs the jury that there is an item of \$9,000.00 in said policy of insurance on 'Gold in Process.' Now, if you believe from the evidence in this case that plaintiff did not have as much as \$9,000.00 worth of 'Gold in Process' at the time of said fire, then

317 the plaintiff cannot recover the full proportionate part of this policy for said item of insurance and you are further instructed that the said policy of insurance provides that this defendant shall not be liable for any loss caused by any neglect of the plaintiff to use all reasonable means to save and preserve the property at and after the fire.

Now, if you believe that there was ore and other material composing Gold in Process remaining after the fire and the plaintiff through its neglect did not save the same when it could have done so, or if any of it after the fire was lost by wind blowing it away, then the plaintiff cannot recover for any part of such property blown away by the wind or any of the same, that it could by reasonable care on its part, have saved.

But this instruction does not mean that plaintiff cannot recover as to that part of such gold in process, if any, which was lost by the direct result of the fire and which plaintiff could not by reasonable care have saved after the fire."

The defendant objected to the court changing, modifying and interlining said instructions, Nos. III, IV, V, and IX, but its objections were overruled, to which rulings of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

Thereupon the court of its own motion gave to the jury the following instructions:

1.

"The jury are instructed that a verdict may be arrived at by the jury by the concurrence of the entire jury, or by the concurrence of either nine, ten or eleven jurors."

2.

"If the entire jury concur in a verdict, the verdict will be signed by the foreman of the jury.

If the verdict is concurred in by either nine, ten or eleven jurors, the verdict will be signed by the jurors concurring therein."

3.

"Any verdict reached by the jury may be written on a full sheet of plain paper."

4.

"If the jury find in favor of plaintiff, the verdict may be in the following form, to-wit:

'We, the jury, find in favor of the plaintiff, and we assess the amount of its recovery at (insert the amount).'"

5.

"If the jury find in favor of the defendant, the verdict may be in the following form, to-wit:

'We, the jury, find for the defendant.'"

6.

"The jury are instructed that the policy sued on was written for a sum of \$2,500.00, which amount was to cover one twentieth part of a total insurance of \$50,000.00 subdivided into various items."

The defendant objected to the above instructions, numbered from 1 to 6, inclusive, given by the court of its own motion, but its objections were overruled, to which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

319 Thereupon after argument of counsel for plaintiff and defendant, the jury retired to their room, and shortly afterwards returned into court the following verdict:

"We, the jury, find in favor of the plaintiff and we assess the amount of its recovery at twenty-six hundred eighty-nine and 57-100 dollars (\$2,689.57).

M. S. McCLINTICK, *Foreman.*"

The defendant objected to the court receiving and entering said verdict, but its objections were by the court overruled; to which ruling of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

And afterwards, to-wit: On March 19th, 1912, and within four days after the return of said verdict, the defendant filed in court its motion for new trial, which motion is in words and figures as follows, to-wit:

"STATE OF MISSOURI,
County of Audrain, ss:

In the Circuit Court, March Term, 1912.

THE GOLD ISSUE MINING AND MILLING COMPANY, Plaintiff,
vs.
THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
a Corporation, Defendant.

Motion for New Trial.

Now comes the defendant herein and moves the court to set aside the verdict in this cause and grant the defendant a new trial, for the following reasons, to-wit:

1. The verdict is contrary to the law.
2. The verdict is contrary to the evidence.
3. The verdict is contrary to the law and the evidence.
- 320 4. The verdict is contrary to the instructions of the court.
5. The verdict is against the weight of the evidence.
6. The verdict is excessive.
7. The verdict is excessive and is the result of the passion and prejudice of the jury against the defendant and favoritism of the jury for the plaintiff.
8. The court erred in admitting improper and illegal evidence on behalf of the plaintiff, over the objections of the defendant.
9. The court erred in excluding proper and legal evidence offered by defendant.
10. The court erred in refusing to give the peremptory instruction to find for the defendant, offered by the defendant at the close of the evidence for the plaintiff.
11. The court erred in refusing to give the peremptory instruction to find for the defendant, offered by the defendant at the close of all the evidence.
12. The court erred in refusing to direct a verdict for the defendant for the reason that the court had no jurisdiction over this defendant, for the reason that the contract of insurance sued upon was a contract of the State of Colorado and not of the State of Missouri, and that therefore Frank Blake, Superintendent of the Insurance Department of the State of Missouri, upon whom service was had in this cause was not authorized by the laws of the State of Missouri to acknowledge or receive service of process issued from any court of record in the State of Missouri for this defendant in this cause of action.
- 321 13. The court erred in refusing to direct a verdict for the defendant for the reason that Section 7042 of the Revised Statutes of Missouri of 1909 is unconstitutional and void because it denies to defendant equal protection of the law and deprives defendant in this action of property without due process of law, and is in conflict with Section 30, Article II of the Constitution of the State of Missouri and in conflict with Section 1 of Article XIV of the Constitution of the United States.

14. The court erred in refusing to direct a verdict for the defendant for the reason that said Section 7042 is unconstitutional and void because it is in conflict with Section 28 of Article IV and because it is in conflict with Section 34 of Article IV of the Constitution of Missouri.

15. The court erred in refusing to direct a verdict for the defendant for the reason that the plaintiff had not complied with the provisions of Sections 904 and 910 of the Revised Statutes of Colorado, for the year 1908, at any time prior to the month of January, 1911.

16. The court erred in giving improper and illegal instructions on behalf of the plaintiff.

17. The court erred in refusing proper and legal instructions requested by defendant.

18. The court erred in giving conflicting instructions.

19. The court erred in refusing proper and legal instructions asked by the defendant and in altering, modifying and changing said instructions and in giving said instructions to the jury in said altered, modified and changed form.

322 . . . 20. There was no evidence to support the verdict in regard to that part of the insurance upon 'Gold in Process.'

21. There was no evidence to support the verdict.

FRED HERRINGTON,
ROBERTSON AND ROBERTSON,

Attorneys for Defendant."

And afterwards, to-wit: On the 19th day of March, 1912, and within four days after the return of the verdict in this case, and at the same term, defendant filed in court its motion in arrest of judgment, which motion is in words and figures as follows, to-wit:

"**STATE OF MISSOURI,**
County of Audrain, ss:

In the Circuit Court, March Term, 1912.

THE GOLD ISSUE MINING AND MILLING COMPANY, Plaintiff,
vs.

THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
a Corporation, Defendant.

Motion in Arrest of Judgment.

Now comes the defendant herein and moves the court to arrest the judgment in this cause, for the following reasons, to-wit:

1. Upon the whole record the judgment should be for the defendant.

2. The court erred in refusing to give the peremptory instruction to find for the defendant, offered by the defendant at the close of the evidence for the plaintiff.

3. The court erred in refusing to give the peremptory instruction to find for the defendant, offered by the defendant at the close of all the evidence.

323 4. The court erred in refusing to direct a verdict for the defendant for the reason that the court had no jurisdiction over this defendant, for the reason that the contract of insurance sued upon was a contract of the State of Colorado, and not of the State of Missouri, and that therefore Frank Blake, Superintendent of the Insurance Department of the State of Missouri, upon whom service was had in this cause was not authorized by the laws of the State of Missouri to acknowledge or receive service of process issued from any court of record in the State of Missouri for this defendant in this cause of action.

5. The court erred in refusing to direct a verdict for the defendant for the reason that Section 7042 of the Revised Statutes of Missouri of 1909, is unconstitutional and void because it denies to defendant equal protection of the law and deprives defendant in this action of property without due process of law, and is in conflict with Section 30, Article II of the Constitution of the State of Missouri and in conflict with Section 1 of Article XIV of the Constitution of the United States.

6. The court erred in refusing to direct a verdict for the defendant for the reason that said Section 7042 is unconstitutional and void because it is in conflict with Section 28 of Article IV and because it is in conflict with Section 34 of Article IV of the Constitution of Missouri.

7. The court erred in refusing to direct a verdict for the defendant for the reason that the plaintiff had not complied with the provisions of Sections 904 and 910 of the Revised Statutes 324 of Colorado, for the year 1908 at no time prior to the month of January, 1911.

8. There is no evidence to support the verdict.

FRED HERRINGTON,
ROBERTSON AND ROBERTSON,
Attorneys for Defendant."

And afterwards, to-wit: On the — day of — defendant's motion for new trial and motion in arrest for judgment coming up for hearing, being argued and submitted to the court, are by the court overruled, to which rulings of the court the defendant then and there by its counsel duly excepted and saved its exceptions.

And that the above matters and things, rulings and exceptions may be made a part of the record herein, defendant tenders this its bill of exceptions and prays that the same be signed, sealed and filed as the record in this cause, which is done this 6 day of March, 1913, and within the time granted by the court for that purpose.

JAMES D. BARNETT,
Judge 11th Judicial Circuit.

Respectfully submitted,

FRED HERRINGTON,
DAVID H. ROBERTSON,
For Appellant.

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(Supreme Court of Colorado, Dec. 7, 1908.)

OHIO-COLORADO MIN. & MILL. CO.

vs.

ELDER et al.

1. Statutes (Sec. 64*)—Partial Invalidity—Legislative Intent:

If it can be said that the legislature would not have passed a law had it known that a part of it was unconstitutional, the whole statute will fall.

[ED. NOTE.—For other cases see statutes, Cent. Dig. Sec. 58; Dec. Dig. Sec. 64*.]

2. Statutes (Sec. 64*)—Partial Invalidity:

Laws 1902, p. 73, c. 3 Sec. 64, requires domestic corporations to pay an annual license tax. Section 65 requires foreign corporations to pay double that imposed on domestic corporations. Sections 66 (page 74) makes a failure to pay the tax, when pleaded, a bar to all actions, etc. The statute having been declared invalid in so far as it sought to impose a greater liability on foreign corporations. Sess. Laws 1907 p. 548 c. 211, was enacted repealing and reenacting such statute except that foreign corporations were taxed the same as domestic corporations but section 11 (page 550) provided that the repeal should not affect any liability or penalty accruing under the repealed sections. Held that section 11 negatived the idea that the legislature would not have passed the act of 1902 had it known that it was in part invalid and its invalidity as to foreign corporations did not render it invalid as to domestic corporations.

[ED. NOTE.—For other cases see Statutes, Dec. Dig. Sec. 64*.]

3. Licenses (Sec. 8*)—Actions—Failure to pay License Tax—Retroactive Statute.

Sess. Laws, 1902, p. 73, c. 3, Sec. 64, imposing a license tax on domestic corporations, and sec. 66 (page 74) permitting the failure to pay the tax to be pleaded in bar of any action, etc., does not apply to an action accruing before its enactment, but does apply to a writ of error sued out in such action after the enactment of the statute, since such writ is in effect a new suit.

[ED. NOTE.—For other cases, see Licenses, Cent. Dig. Sec. 16; Dec. Dig. Sec. 8*.]

4. Appeal and Error (Sec. 1*)—Nature—Appeal.

The perfecting of an appeal is the continuation of the action in which the judgment appealed from was rendered.

[ED. NOTE.—For other cases, See Appeal and Error, Cent. Dig. Sec. 2; Dec. Dig. Sec. 1*.]

5. Appeal and Error (Sec. 1*)—Nature—Writ of Error.

While an appeal is a continuation of the action below, the suing out of a writ of error is a new suit brought to set aside the judgment below.

[ED. NOTE.—For other cases, see Appeal and Error, Cent. Dig. Sec. 2; Dec. Dig. Sec. 1*.]

6. Licenses (Sec. 8*)—Statutory Provisions.

Sess. Laws 1902; pp. 73, 74, c. 3, Sections 64-66, imposed a license tax on corporations, and permitted the failure to pay such tax to be pleaded in bar of any action. Sess. Laws, 1907, p. 548, c. 211, repealed such act as to the clause relating to the bringing of actions but provided that the appeal should not affect any penalty accruing under the former statute. Held, that a writ of error sued out in 1905 by a domestic corporation which had not paid its license tax would be dismissed.

[ED. NOTE.—For other cases, see Licenses, Dec. Dig. Sec. 8*.]

Campbell, Gabbert and Helm, JJ., dissenting.

En Banc. Error to District Court, Gunnison County, Theron Stevens, Judge.

329 Action between the Ohio-Colorado Mining & Milling Company and Rufus C. Elder and another as executors of George W. Elder, deceased, and others. Judgment against the Company, and it brings error. Dismissed.

E. M. Nourse, for plaintiff in error. George R. Elder, for defendants in error.

BAILEY, J.:

On the 5th of February, 1908, the defendants in error filed a motion to dismiss the writ of error theretofore issued in this case, for the reason that plaintiff in error had failed to pay the annual corporation license tax provided by Sess. Laws 1902, p. 43, c. 3, for the years 1902, to 1908, inclusive. For the purpose of avoiding the dismissing of the writ of error, the court then made a rule upon plaintiff in error to pay the tax. Plaintiff in error, instead of paying the tax, filed a protest against the order, contending that, inasmuch as the federal Supreme Court declared that portion of the Act of 1902 providing for the imposition of the annual state corporation license tax upon foreign corporations to be unconstitutional, the provisions of the act relating to domestic corporations was thereby rendered nugatory, and could not be enforced. Am. Smelting & Refining Co. v. People, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393. Plaintiff in error appears to misapprehend the effect of the decision. Section 64 of the act provides that domestic corporations shall on or before the 1st day of May of each year pay an annual state corporation license tax to the Auditor of the State of 2 cents upon each \$1,000 of

its capital stock. Section 65 of the act provides that every foreign corporation which has heretofore obtained or which shall hereafter obtain the right to transact business within the state shall pay 4 cents upon each \$1,000 of its capital stock. Section 66 of the act provides that the failure to pay such tax may be pleaded and maintained as an absolute defense to any and all actions, suits, or proceedings in law or in equity brought or maintained by such corporation in any court within the limits of the state until such tax is paid.

The American Smelting and Refining Company was a corporation which had obtained the right to transact business in the state of Colorado previous to the adoption of the law of 1902, and, upon its failure to pay the tax provided in that law, an action was brought in the name of the State to have such right to transact business forfeited. It was determined by the federal Supreme Court that the State, by granting the right to the foreign corporation to transact business

within the state, in consideration of the payment of the corporation fee, entered into a contract with the corporation that thereafter no greater liabilities would be imposed upon it than upon like domestic corporations, and that in so far as the act of 1902 sought to impose a greater liability upon foreign corporations, which then possessed the right to carry on business within the state, than upon like domestic corporations, it was in violation of the contract, and therefore void. It was not determined that the entire section was unconstitutional, but only so much of it as applied to those foreign corporations which had entered the state previous to the enactment of the law. Plaintiff in error further says that the law ought not to be enforced as against domestic corporations, because, if the Legislature had known that the provisions of the act relating to such foreign corporations were inoperative, the law could not have been passed. That principle has been announced in many well considered cases which it is unnecessary to here investigate. The General Assembly in the year 1907, repealed the law of 1902, but provided that the repeal "shall not have in any manner the effect to release, extinguish, alter, modify or change any penalty or liability which shall have accrued under the sections repealed and such sections shall be treated and held as still remaining in force for the purpose of sustaining any proceedings for the enforcement of such penalty." Sess. Laws 1907 p. 550, c. 211, Sec. 11.

In the act repealing the old law its provisions were re-enacted with the exception that foreign corporations were placed upon the same basis as domestic corporations. The provision that the repeal shall not effect the liabilities and penalties provided for in the old act is a sufficient answer to the argument that it would not have imposed the tax upon the domestic corporations had it known that the provisions concerning foreign corporations of the character of the smelting company were inoperative. Plaintiff in error asserts that the provisions that the failure to pay the tax can be pleaded as a defense to an action instituted by the delinquent corporation cannot be invoked in this case because the cause of action accrued previous to the passage of the act. We have already determined that such is the law. *Malley v. Wolfe Londoner*, 41 Colo. 436; 93 Pac. 488.

That rule is not applicable in this case. While the cause of action alleged in plaintiff's complaint (if any there be) accrued previous to the passage of the act, the writ of error was sued out of this Court in 1905 after the passage of the act. While the perfecting of 331 an appeal is the continuation of the suit in which the judgment appealed from was rendered, the suing out of a writ of error is a new suit. (*Connor v. Estate of James Connor*, 4 Colo. 74; *Willoughby v. George* 5 Colo. 80; *Webster v. Gaff*, 6 Colo. 475), and the cause of action of such new suit is to annul and set aside the judgment of the trial court (2 Cyc. 510; *Allen, Ball & Co. v. Mayor of Savannah*, 9 Ga., 286; *Gibbs v. Belcher* 30 Tex. 79). That the suing out of a writ of error is the commencement of a new suit has been frequently held in this state, namely: *Wise v. Brocker*, 1 Colo., 550, in which new parties were brought in. *Western Union Tel. Co. v. Graham*, 1 Colo. 182, *Talpey v. Doane*, 2 Colo. 298, and *Filley v. Cody*, 3 Colo. 221, are cases in which the suing out of a writ of error by a non-resident was held to be a new suit to such an extent as to compel the nonresident to file a cost bond. In *Cheever v. Minton*, 12 Colo. 557, 21 Pac. 710. 13 Am. St. Rep. 258, and *Stout v. Gully*, 13 Colo. 604, 22 Pac. 954, it was said that the suing out of a writ of error is the commencement of a new suit, and that between the time of the rendering of the original judgment and the suing out of the writ no action was pending. In view of these authorities it must be determined that the provision of the statute in relation to the payment of the tax before a corporation may maintain an action is as applicable to a case pending in this court upon error as it is to one pending in the *nisi prius* courts.

While it is true that the act of 1907, which repeals the sections of the law of 1902 under consideration, does not fix as one of the penalties for the nonpayment of the tax that the corporation shall be deprived of the right to bring and maintain suits yet his action was brought while the law of 1902 was in effect, and the law of 1907, as we have seen, especially provides that the repeal of the law of 1902 shall not affect the right to enforce any of the penalties prescribed in the previous act.

Plaintiff in error having neglected and failed to pay the tax as provided by law, the writ of error will be dismissed.

Campbell, Gabbert and Helm, JJ., dissent.

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101 Pacific Rep., 345.

(Supreme Court of Colorado, April 5, 1909.)

ROLLINS

v.

FEARNLEY et al.

1. Corporations (Sec. 499*)—Right to Sue—Certificate to do business—Failure to obtain—Effect:

Failure of a corporation to pay to the state an annual license tax and to procure a certificate authorizing it to do business was cured,

as affecting the company's right to defend a suit, by payment of the tax and obtaining a certificate before the hearing.

[ED. NOTE.—For other cases, see Corporations, Cent. Dig. Sec. 1918; Dec. Dig. Sec. 499.*]

2. Judgment (Sec. 747*)—Res Judicata:

A decree in a statutory proceeding upon constructive service adjudging plaintiff to be sole owner of an irrigation ditch, even if conclusive as between that ditch and other ditches taking water from the same source, is not res judicata as between the several claimants to ownership of the ditch.

[ED. NOTE.—For other cases, see Judgment, Dec. Dig. Sec. 747.*]

3. Appeal and Error (Sec. 882*)—Persons Entitled to Complain.

Plaintiff on appeal cannot complain of a dismissal of the cross-bill where he sought its dismissal below.

[ED. NOTE.—For other cases, see Appeal and Error, Cent. Dig. Secs. 3591-3610; Dec. Dig. Sec. 882.*]

Appeal from District Court Arapahoe County; A. H. De France, Judge.

Action by Robert P. Rollins against Joshua Fearnley and others. Judgment dismissing the suit, and plaintiff appeals. Affirmed.

This is an action for equitable relief commenced by the plaintiff, Robert P. Rollins, appellant here, in the District Court of Arapahoe County in the summer of 1903, to enjoin the defendants, Joshua Fearnley, the Fearnley Investment and Real Estate Company, and Charles Sandell, appellees here, from diverting water for irrigation purposes from and through what is known as the "J. D. Ward Ditch No. 2." The plaintiff claims by virtue of a decree theretofore obtained in the district court of Douglas county for water district No. 8, under the statute, upon constructive service merely, providing for the adjudication of water rights in water districts, to be the sole owner of said J. D. Ward Ditch No. 2, and the only person entitled to take water therefrom for irrigation; and that he is entitled to use 7.05 cubic feet of water per second of time through it; that being its full carrying capacity.

Excepting formal matters, the allegations of the complaint are put in issue. By way of further answer and cross-complaint, defendants set up in substance that the ditch in question was constructed in the year 1881 by one Belle M. Sanderson upon, through and across lands then owned by her, she being the immediate grantor of Joshua Fearnley and another title to which said lands, with all appurtenant ditch and water rights, ultimately vested in the Fearnley Investment and Real Estate Company, one of the other defendants. The interest of the defendant Charles Sandell comes by way of leasehold rights. Further, that said ditch and a portion of the water flowing through

it has been constantly and continuously used by said Sanderson and these defendants, or some one or more of them, for the irrigation of said lands since said year 1881. That one Jasper D. Ward
333 in the year 1882, being then and there the owner of certain other lands adjacent or near to those above mentioned, and now in possession of and owned by plaintiff herein, in order to secure any surplus water that might be obtained through said ditch, entered into a parol agreement with said Sanderson, who was then, as is claimed, the sole constructor, owner and user of the said J. D. Ward Ditch No. 2, then known and designated as the "Sanderson Ditch" whereby the said Ward was given the privilege of reconstructing enlarging and maintaining said ditch at his own expense, and extending the same from its then terminus to his property, in consideration that said Sanderson was at all times to have free of charge the prior right to the use of the necessary water for the cultivation of the land theretofore irrigated by her through said ditch, said Ward to have the use only of the surplus water supply therefrom. Defendants also allege in support of their said further answer and cross-bill that said Ward, in pursuance of said agreement, and during the year last aforesaid, did construct, enlarge and extend said ditch, and that thereafter, and until on, to wit, October 14, 1899, when he sold and conveyed his said lands to the plaintiff, complied fully with the terms of said oral agreement. That said Sanderson and her grantees, since said ditch enlargement and extension, have continued to use the water from said ditch upon the lands between it and the gulch from which the water supply is taken, just as was done prior to its said extension and enlargement. That irrigation has been thus continuously carried on by said Sanderson and her grantees, upon said lands under said agreement, up to the time of the granting of the injunction herein. That the plaintiff had full and actual notice of the right the defendants claimed to have in and to said ditch, and knew that said defendants and their grantors were at said time, and for a long time prior thereto had been exercising acts of ownership over said ditch, and flowing water therein for the purpose of irrigating their lands thereunder. Yet, that said plaintiff in the face of said knowledge, deliberately, fraudulently and designedly, without any actual notice or attempt at actual notice to the defendants, or any or either of them, but secretly and upon constructive notice only, did obtain from the district court of
334 Douglas county the decree upon which they rely herein for equitable relief, and did then and there intentionally and wilfully withhold and conceal the aforesaid facts, touching the rights of the defendants in and to said ditch and to the use of water therein, from the court granting said decree. The defendants upon their said further answer and cross-complaint prayed judgment that the said decree and award to the plaintiff be annulled, set aside and for naught held, and also for affirmative relief adjudicating the respective rights of the parties to the use of water through said J. D. Ward Ditch No. 2, and of ownership therein. A motion by plaintiff to strike the further answer and cross-complaint, and then a special demurrer thereto, were in turn overruled by the court. Issue was

joined on the facts set forth in said cross-complaint by plaintiff's reply thereto, except only as to formal matters. For an additional defense to the cross complaint the plaintiff further pleads in reply the facts that the defendant company had failed to pay to the state the annual license tax required by law, and had procured no certificate of authority to carry on business here.

Upon the issues so tendered trial was had before the court without a jury, and at the conclusion thereof plaintiff's complaint, and the cross-bill as well, were dismissed. The findings were to the effect that plaintiff had shown no equities and was not entitled to injunctive relief. The cross-bill was dismissed for the reason that the testimony showed that all of the parties necessary to a full, final and complete adjudication, as to who were in fact the lawful users of water through the ditch in question and the rightful owners thereof, were not before the court, and the parties were remanded to their proper and appropriate remedy to have all those questions determined. To review said action of the court the plaintiff brings this case here on appeal.

William Young for appellant. George F. Dunklee and O. E. Jackson, for appellees.

BAILEY, J. (after stating the facts as above) :

Upon the question of the payment of the annual state license tax the proof shows that prior to the hearing the defendant company paid the same and submitted in evidence a properly authenticated certificate to that end. This disposes of the contention in that behalf. That this payment was in apt time is supported by the opinion of this Supreme Court in the case of Ohio-Colorado, M. & M. Company v. Rufus C. Elder et al., (Colo.) 99 Pac. 42, where leave was given to the plaintiff in error, even at that late day to pay said tax produce the proper proof thereof, and thus avoid a dismissal of the writ of error on that ground. The statute seems to indicate by its very terms that such course is admissible, because it provided expressly that, until said tax is paid a defaulting company may neither maintain nor defend a suit, thereby implying that it may do either, whenever such disqualification is removed. Under the facts here disclosed this defense was therefore not available to the plaintiff against said cross-complaint, after a compliance by the defendant company with the requirements of the law.

On the main question, assuming the decree relied upon by the plaintiff, in so far as it attempts to adjudicate the priority of the right of the J. D. Ward ditch No. 2, under the special statutory proceeding, as between it and other ditches taking water from the same source, is valid, though we do not expressly so decide, still that decree is in no sense res adjudicata as between the rights of the several claimants to the ownership of the ditch itself, and of their respective rights to the use of water through it. In the statutory proceedings it is not contemplated that the ownership of the ditches or of the rights of the various users, as between themselves, of water through them are to be determined. Such a decree furnishes no

basis for injunctive relief by one claimant to the use of water through a given ditch as against another claimant with equally good or possibly superior rights therein. In so far as this decree purports to settle and fix relative rights of individual users and consumers of water through said ditch it is ineffectual. Manifestly so where no actual notice was given to other claimants that an attempt would be made to obtain a decree of that character. The statutory proceedings in question were and are not intended for that purpose, but simply to adjudicate the priorities of right as between the several ditches of a district drawing water from a common source. It 336 may well be doubted, even where parties submit themselves to the jurisdiction of the court in such special proceedings, whether their respective conflicting rights to the use of water through a specified ditch could then be lawfully adjudged, such course not being within the purview of the law.

This doctrine has abundant support in the decisions of this court and of the Court of Appeals. In *Oppenheimer v. Left Hand Ditch Company*, 18 Colo. 147, 31 Pac. 856, where the direct contention was made that such an adjudication was res adjudicata as between the several claimants as to the right to the use of water through the same ditch, this announcement was made:

"In respect to this claim it may be said that decrees rendered under the acts of 1879 and 1881, determining the priorities and the amount of the appropriations of the several ditches in an irrigation district, are not intended to designate the person or persons entitled to the use of the water thus appropriated. Such a decree is not res judicata as to the party or parties entitled to the control of a particular ditch or to the use of water conveyed through the same, but only as to the priority and amount of appropriation of such ditch."

The cases of *Evans v. Swan et al.*, 38 Colo. 92, 88 Pac. 149 and *O'Neil v. Ft. Lyons Canal Co.*, 39 Colo. 487, 90 Pac. 849, are to the same effect.

In *Putnam v. Curtis et al.*, 7 Colo. App. 440, 43 Pac. 1058, having reference to a like contention, it was said:

"The answer sets up the former decree as an adjudication of the questions involved in this suit, and by which the plaintiff is barred. In other words, it is claimed that by reason of that decree this cause of action is res adjudicata. That decree was not an- could not be an adjudication of any right or claim of the plaintiff's grantors, as between them and the other owners of the same ditch. It does not purport to determine what persons owned the ditch, or what their respective interests in it, or the water which it carried, were; but if the court had, in that proceeding, undertaken to adjust the rights and proportionate interests of the several claimants of the ditch as 337 against each other, its judgment would have been to that extent a nullity. The proceeding in which the decree was rendered was a special one, provided by the statute for the sole purpose of ascertaining and adjudicating the proprieties of right to the use of water between the several ditches, canals and reservoirs in the same water district. The statute invests the court with jurisdiction to establish the rank of the several ditches with relation to each other,

based upon the different dates of appropriation of water, the quantity appropriated, and the means employed to utilize it; and to award to each the priority to which it may be entitled; but it does not authorize inquiry into the relative rights of co-claimants in the same ditch, or any adjustment of their disputes amongst themselves."

Upon the hearing the trial judge at the conclusion of the testimony found that the equities of the case instead of being with the plaintiff were with the defendants. This was and is in effect a finding, that the plaintiffs must have had knowledge of the claimed rights of defendants, and their grantors, in and to the ditch in question, and to the use of water for irrigation purposes through it. This conclusion finds ample support in the testimony and is undoubtedly correct. The court's determination of the matter means also that plaintiff, with full information of the rights of the defendants, sought and obtained without notice, or attempt at notice, to them, other than of a constructive character, a decree of court adjudging him to be the sole owner of the ditch in question, with the exclusive right to the use of water through it for irrigation. Thus equipped, he presents himself in a court of equity and asks injunctive relief against those upon whom he has perpetrated this wrong. The judge below denied this relief and promptly dismissed plaintiff's complaint as being without equity, and such action, upon the facts here disclosed, was right and meets our unqualified approval.

The only other alleged error which deserves notice is that the court dismissed the cross-complaint without determining the rights of the various parties, claiming an interest in, and the right to the use of water through, said ditch. Had the defendants assigned cross-error

on such actions of the court a question of some difficulty

338 might be presented. But since the action of the court in that

particular was the very thing which the plaintiff, from the moment the cross-complaint was filed, and constantly thereafter, urged the court to take, he at least ought not to be heard to complain. It would indeed present a unique proposition had the court on plaintiff's motion, stricken the cross-bill, if he were permitted now to urge such action as erroneous. The situation is not greatly different in the present state of the record. When, during the progress of the trial, the fact developed that all of the parties necessary and essential to a complete determination of the controversy were not before the court, and no effort was then made by anyone already there to have such other parties brought in, we are not prepared to say that the court might not with entire propriety dismiss the proceedings; in any event the case should not be reversed on this ground at the behest of the plaintiff. All matters affecting his rights, as alleged and set forth in his complaint, were correctly determined by the trial court, and as he alone is here complaining, the judgment will be affirmed, leaving the parties to their appropriate remedy for an adjudication, among themselves, relative to the ownership of said ditch, and their respective rights to the use of water therein.

Judgment affirmed.

Steele, C. J., and White, J., concur.

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(92 Pac. Rep., 727-731.)

(Supreme Court of Colorado, Nov. 4, 1907.)

INTERNATIONAL TRUST CO.

v.

A. LESCHEN & SONS ROPE CO. et al.

1. Corporations—Foreign Corporations—Powers of States to Regulate.

The Legislature has power to prescribe the conditions on which foreign corporations may do business within the state, and require a compliance therewith as a condition precedent to their invoking the jurisdiction of its courts.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, Secs. 2505-2527.)

2. Commerce—Interstate Commerce—Regulation by State Foreign Corporations.

The Legislature, in exercising its powers to prescribe conditions on which a foreign corporation may do business within the state, may not impose any restrictions or burden on interstate commerce.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, Secs. 100, 113, 126.)

3. Same.

A corporation of one state may send its agents to another to solicit orders for its goods or contract for a sale thereof without being embarrassed by state requirements as to making out licenses, filing certificates, establishing resident agencies, and the like.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, Secs. 100, 113, 126.)

4. Corporations—Foreign Corporations—Doing Business in State.

A foreign corporation, in pursuance of a sale of its products to a domestic corporation made by its traveling salesman, entered into a written contract in Colorado with the domestic corporation to furnish manufactured materials f. o. b. at its plant and office in the state of its origin. The materials were furnished. Held, that the sale and delivery of the materials did not constitute doing business within the act of April 6, 1901 (Laws 1901, p. 116, c. 52), prescribing the terms on which a foreign corporation may do business within the state, and it had a right to invoke the aid of the courts in the collection of the indebtedness accruing to it by reason of such transaction.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Corporations, Secs. 2520-2527.)

5. Same—Compliance with Requirements.

Where a foreign corporation actually complies with the act of April 6, 1901 (Laws 1901, p. 116, c. 52), prescribing the terms on which a foreign corporation may do business within the state, and prohibiting the exercise of corporate powers or the prosecution or the defense of actions until the required fee shall have been paid and the prescribed certificate obtained subsequent to the commencement of an action on a contract made with a domestic corporation, it may maintain the action and enforce the contract; the prohibition being only provisional, subject to removal at any time.

Appeal from District Court, Dolores County; James L. Russell, Judge.

Action by the A. Leschen & Sons Rope Company against the International Trust Company and another. From a judgment 340 for plaintiff, defendant International Trust Company appeals.

A. Leschen & Sons Rope Company, appellee, and herein referred to as plaintiff, was at the time of the transaction involved in this controversy a corporation organized under the laws of the state of Missouri, with its plant and office in St. Louis, Mo., and was engaged in selling goods in the State of Colorado and other states of the Union. On August 17, 1901, in pursuance of a sale made by one of its traveling salesmen, it entered into a written contract at the town of Rico, Colo., with the Pro Patria Mining & Milling Company, a corporation organized under the laws of this state, to furnish certain manufactured materials and supplies f. o. b. St. Louis, Mo., to be used by the milling Company in the erection and construction of a wire rope tramway which the latter company was about to build upon its property and right of way from, or near, its group of mines in Dolores county, Colo., to a concentrating plant about to be built by the milling company at Rico, at and for the agreed price of \$2775, payable 50 per cent, on receipt of bill of lading, and 50 per cent, on final delivery of materials. These materials and supplies were furnished between August 17 and December 31, 1901. On September 1, 1901, the Pro Patria Mining & Milling Company executed a trust deed on all its property to the International Trust Company, a corporation organized under the laws of Colorado, to secure a certain bond issue. This trust deed was recorded September 18, 1901. On January 22, 1902, the plaintiff filed a lien statement under the provisions of our mechanic's lien law. On February 8, 1902, the plaintiff filed a complaint in the district court of Dolores county to recover the sum of \$3,016.74, the balance due for the materials aforesaid, and for other materials subsequently ordered and furnished, averring that the materials and supplies were furnished by plaintiff and used by the milling company in the erection and construction of the tramway. The ap-

pellant, the International Trust Company, was made a party 341 to the action because it claimed some interest in the property sought to be subjected to the mechanic's lien by virtue

of the lien created by the trust deed aforesaid. Prayer for judgment for \$3,016.74 against the Pro Patria Mining & Milling Company; that the same be adjudged a lien upon the property and premises described in the lien statement prior in time and right to the lien of the trust deed; that the property and premises be sold and the proceeds applied to the payment of the same. The defendants filed separate answers, setting up (1) that said plaintiff had never filed with the Secretary of State a copy of its charter or of its certificate of incorporation; (2) that said plaintiff had not filed with the Secretary of State a certificate designating its principal place of business and an agent upon whom process might be served, and that plaintiff had not complied with the requirements of sections 4 and 10 of "An act relating to corporations, and prescribing certain fees to be paid by corporations, foreign and domestic, and to repeal certain acts and all acts and parts of acts in conflict therewith," approved April 6, 1901. Laws 1901, pp. 118, 121, c. 52.

These sections read as follows:

"Sec. 4. Every corporation, joint stock company or association, incorporated by or under any general or special law of any foreign state or kingdom, or any state or territory of the United States, beyond the limits of this state, having a capital stock divided into shares, shall pay to the Secretary of State, for the use of the state, a fee of thirty dollars in case the capital stock which said corporation, joint stock company or association is authorized to have, does not exceed fifty thousand dollars; but in case capital stock thereof is in excess of fifty thousand dollars the Secretary of State shall collect the further sum of thirty cents on each and every thousand dollars of such excess, and a like fee of thirty cents on each 342 thousand of the amount of each subsequent increase of stock.

The said fee shall be due and payable upon the filing of the certificate of incorporation, articles of association or charter or said corporation, joint stock company or association in the office of the Secretary of State, and no such corporation, joint stock company or association shall have or exercise any corporate powers or hold or acquire any real or personal property, franchises, rights or privileges, or be permitted to do any business or prosecute or defend in any suit in this state until the said fee shall have been paid."

"Sec. 10. No corporation, joint stock company or association, incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom or of any state or territory of the United States, beyond the limits of this state, shall exercise any corporate powers or acquire or hold any real or personal property, or any franchises, rights or privileges, or do any business or prosecute or defend in any suit, in this state until it shall have received from the Secretary of this State a certificate setting forth that full payment has been made by such corporation, joint stock company or association, of all fees and taxes prescribed by law to be paid to the Secretary of State, and every such corporation, joint stock company or association shall pay to the secretary of State for each such certificate, a fee of five dollars. Nothing in this section shall apply to corporations not for pecuniary

profit, or corporations organized for religious, educational or benevolent purposes."

The plaintiff filed replications to these answers, averring that its headquarters and principal place of business is in St. Louis, State of Missouri; that it had no established agency or place of business in Colorado; that it had traveling salesmen who are continuously traveling through the various states and territories of the United

343 States; that the orders for the appurtenances and materials mentioned in the complaint were taken by one of its traveling salesmen while traveling through the state of Colorado, at the instance of the milling company, and were sold to be delivered to the milling company on board the cars at St. Louis, and were to be paid for at the city of St. Louis, in the state of Missouri, and denies that the transaction described in the complaint, out of which the action arose, constituted doing business in the state of Colorado within the meaning of the foregoing statutes. On May 19, 1904, a supplemental and further reply to the answer was filed, setting forth that on, to wit, the 23rd day of October, A. D. 1903, the plaintiff did comply with all the requirements of the statute, and had done all things necessary to qualify and authorize the plaintiff corporation to transact business in the state of Colorado, and to sue and defend all suits in the courts of said state. Upon the trial it was expressly stipulated that all the facts in this supplemental reply were true. There was no controversy as to the indebtedness of the milling company to the plaintiff, and that there was \$3,577.87 due from said company to the plaintiff. Appellant moved for judgment on the pleadings. The court overruled said motion, and sustained a motion of plaintiff for judgment against the milling company for the amount claimed, whereupon testimony was taken on the part of plaintiff in support of its mechanic's lien claim, and also as to the priority of such lien to the lien of the trust deed. Appellant excepted to the overruling of its motion for judgment, and also objected to the introduction of evidence in support of the mechanic's lien claim, upon the ground that plaintiff had failed to comply with the statutes of the state, and had no right to transact business in the state, or to acquire a lien upon the property, either at the time of instituting the suit or the filing of the lien statement. A final

344 decree was rendered in favor of plaintiff against the milling company for the amount aforesaid, and adjudging and decreeing to it a lien upon the tramway and the premises described in the complaint for the amount agreed upon to date from September 1, 1901. The reverse this judgment, the International Trust Company brings the case here on appeal.

Macbeth & May, for appellant. L. W. Allen and Goudy & Twitchell, for appellees.

GODDARD, J. (after stating the facts as above) :

1. The Legislature has power to prescribe the terms and conditions upon which foreign corporations may do business within the state, and require a compliance with such terms and conditions as a condition precedent to their invoking the jurisdiction of its

courts. In *Paul v. Virginia*, 8 Wall. (U. S.) 168, 181, 19 L. Ed. 357, Mr. Justice Field, speaking for the court, said: "The corporation, being a mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. * * * The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely. They may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion."

2. It is also well settled that, in exercising such power, the Legislature may not place any restrictions or impose any burdens upon interstate commerce. As was said in *Lyng v. State of Michigan*, 135 U. S. 161, 166, 10 Sup. Ct. 725, 726, 34 L. Ed. 150. "We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation, of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

3. The controlling and decisive question presented for our determination is whether the transaction out of which this controversy arises constitutes interstate commerce. That it does is abundantly shown by numerous cases, among them *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 737, 5 Sup. Ct. 739, 28 L. Ed. 1137; *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Caldwell v. N. Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. St. 576, 46 L. Ed. 785; *Mearshon & Co. v. Lumber Co.* 187 Pa. 17, 40 Atl. 1019, 67 A. St. Rep. 560; *Coit & Co. v. Sutton*, 102 Mich. 324, 327, 60 N. W. 690, 25 L. R. A. 819; *Rock Island Plow Co. v. Peterson*, 93 Minn. 356, 101 N. W. 616; *Kindel v. Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; *Miller & Co. v. Goodman*, 91 Tex. 41, 40 S. W. 718. The above and many other decisions of the Supreme Court of the United States and of the highest state tribunals fully establish the rule that a corporation of one state may send its agents to another to solicit orders for its goods, or contract for the sale thereof, without being embarrassed or ob-

structed by state requirements as to taking out licenses, filing certificates, establishing resident agencies, or like troublesome or expensive conditions. The case of Robbins v. Shelby Taxing District is one of the leading cases upon this subject. It was tried upon an agreed statement of facts, as follows: "Sabine Robbins is a citizen and resident of Cincinnati, Ohio, and on the —
346 day of —, 1884, was engaged in the business of drumming in the taxing district of Shelby county, Tenn.; i. e. soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of 'Rose, Robbins & Co.,' doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio. While engaged in the act of drumming for said firm, and for the claimed offense of not having taken out the required license for doing said business, the defendant, Sabine Robbins, was arrested by one of the Memphis or taxing district police force, and was carried before the Honorable D. P. Hadden, president of the taxing district, and fined for the offense of drumming without a license. It is admitted the firm of 'Rose, Robbins & Co.' are engaged in the selling of paper, writing materials, and such articles as are used in the book stores of the taxing district of Shelby county, and that it was a line of such articles for the sale of which the said defendant herein was drumming at the time of his arrest." The court held upon these facts that the statute of Tennessee of 1881, *enacted* that "all drummers and all persons not having a regular licensed house of business in the taxing district 'of Shelby county,' offering for sale, or selling goods, wares or merchandise therein by sample, shall be required to pay to the county trustee the sum of \$10 per week, or \$25 per month, for such privilege," was void as against Robbins. The opinion of the court was delivered by Mr. Justice Bradley, in the course of which he said (page 494 of 120 U. S., page 594 of 7 Sup. Ct. (30 L. Ed. 694); "In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject. In view of these fundamental principles, which
347 are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant of one state to sell his goods in another state without in some way obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may undoubtedly *by* safely done with regard to some products for which there is always a market and a demand, or where the

course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may perhaps safely take his goods to the city of New York, and be sure of finding a stable and reliable market for them. But there are hundreds, and perhaps thousands, of articles, which no person would think of exporting to another state without first procuring an order for them. It is true a merchant or manufacturer in one state may erect or hire a warehouse or store in another state in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or store in every state with which he might desire to trade. Surely he cannot be compelled to take this inconvenient and expensive course. In certain branches of business he may adopt it with advantage. Many manufacturers do open houses or places of business in other states than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other states? Must he sit still in his factory or warehouse,

348 and wait for the people of those states to come to him?

This would be a silly and ruinous proceeding. The only way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly and without due attention to the truth of things." In Miller & Co. vs. Goodman, it is said: "The statute is not invalid because it violates any right of the corporation to do business in this state, but is void if so applied, because the state Legislature had no power to make such provisions applicable to interstate commerce. Such legislation would be equally void whether applied to natural persons, citizens of other states, or corporations created by such other states. It is the character of the business transacted, over which the state has no authority which renders its action a nullity." In Coit & Co. v. Sutton the findings of fact show that plaintiff was engaged in the business of shipping from Illinois goods manufactured in that state to its customers in Michigan on orders given by mail, or taken by its agents in Michigan. At the time of making the sale there under consideration the plaintiff had not filed articles of association in that state, and had not paid to the Secretary of State the franchise fee as prescribed by statute. The court had under consideration the validity of a judgment recovered by the plaintiff corporation for lead sold in pursuance of a written contract with the defendant, which defendant refused

to receive claiming the contract to be void. It was there said: "The law in question imposes a tax upon corporations for the privilege of doing business in Michigan. It is a tax upon the occupation of the corporation, with a provision that all its contracts shall be void until the tax is paid, which, if enforced, would embarrass plaintiff in its commerce with inhabitants of Michigan. It must therefore be held that the act in question does not apply to foreign corporations whose business within this state consists merely of selling through itinerant agents, and delivering, commodities manufactured outside of this state." In Cooper Mfg. Co. v. Ferguson, Mr. Justice Matthews used this language: "It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicile in that state, and to prohibit it from carrying on within that state its business of manufacturing machinery; but it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce among the states." In Kindel v. Lithographing Co., Chief Justice Hayt, speaking for this court, said: "In this case appellee contracted to make the calendars at its place of business in Wisconsin, and delivered them to appellant in Colorado. To give the state constitution and statute the construction claimed by appellant would be to permit a state to regulate commerce among the states, authority for which is conferred exclusively upon Congress. U. S. Const. art. 1, Sec. 8. See opinion by Mr. Justice Matthews in Cooper Manufacturing Company v. Ferguson." Under the ruling of these cases, which we accepted as a correct interpretation of statutes like ours, it must be held that the sale and delivery of the materials and supplies mentioned in the complaint did not constitute doing business within the intendment of the sections of our statute above quoted. It therefore necessarily follows that, if the plaintiff was not required to comply with the terms of the statute in order to enable it to transact the business complained of it had a right to invoke the aid of the courts in the collection of the indebtedness accruing to it by reason of such transaction. Wolff Dryer Co. v. Bigler & Co., 192 Pa. 466, 471, 43 Atl. 1092; Spry Lumber Co. v. Chappell, 184 Ill. 539, 56 N. E. 794; Miller & Co. v. Goodman, *supra*. In the latter case it is said:

"If the corporation was not required to comply with the 350= terms of article 745, Rev. St. 1895, then the prohibition against maintaining a suit contained in article 746 would not apply to it; and it is unnecessary for us to discuss the question raised by counsel for appellants as to the power of the state to prohibit a corporation to sue in the courts of such state."

4. After the commencement of the suit and before trial, the plaintiff fully complied with all the requirements of our statutes, and established an agency and place of business in the state. If, therefore, it could be held that the transaction under consideration came within the inhibition of the statutes, said subsequent compliance would entitle plaintiff to maintain this action. The statute prohibits the prosecution or defense of an action "until the fee shall

have been paid," and the prescribed certificate obtained. The prohibition is therefore only provisional, and may be removed at any time under the terms of the act itself. *Ceser vs. Capell* (C. C.) 83 Fed. 403; *Asphalte Co. v. Mayor*, 155 N. Y. 373, 49 N. E. 1043; *Carson-Rand Co. v. Stern*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420; *Ryan Live-Stock & Feeding Co. v. Kelly*, 71 Kan. 874, 81 Pac. 470. In the latter case, the Supreme Court of Kansas, deciding the question here presented, said: "The plaintiff in this case is a private foreign corporation, and it was conceded upon the trial that it had not at the commencement of the action complied with the corporation laws of the state of Kansas; but it was proven that prior to the trial in this case it had complied therewith, and had received *and* certificate from the Secretary of State evidencing that fact. The sole question presented in this case is whether the corporation, not having filed the statement and procured the certificate required by law before the commencement of the action, could comply with the law thereafter, and maintain the action. The court below decided this question in the negative, and dismissed the action. Its judgment is reversed on the authority of *State v. Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N. S.) 1041, *Deere v. Wyland*, 69 Kan. 255, 351 76 Pac. 863, and *Hamilton v. Reeves & Co.*, 69 Kan. 844, 76 Pac. 418."

We think that the purpose of the statute is fully accomplished by an actual compliance with its requirements subsequent to the commencement of the action, and renders enforceable a contract therefore unenforceable by reason of the failure to comply therewith. For the foregoing reasons, the plaintiff was entitled to maintain this action, and the judgment and decree of the court below is therefore affirmed.

Affirmed.

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59 Pacific, 740.

(Supreme Court of Colorado, Dec. 19, 1899.)

MILLER
v.
WILLIAMS et al.

Alteration of Instruments—Evidence—Mortgages—Trust—Deeds—Resignation of Trustee—Foreign Corporation—Variance.

1. Alteration of the date of a notary's certificate of acknowledgement, made with the consent of the parties to the instrument, and before delivery, does not affect its validity.
2. Possession of an instrument by the party claiming under it at the trial is *prima facie* evidence that it was delivered at the time it bears date.
3. A trustee under a trust deed may resign and refuse to act either before or after default, though he had accepted the trust.
4. A foreign corporation having filed its certificates and copy of its

- charter, etc., as required by Gen. St. 1883, Sects. 251, 261, 265 and Sess. Laws 1887, p. 406, may take under a trust deed executed before, but not delivered until after, compliance with such acts.
5. Under a contention that a trust deed is void because the payee is a foreign corporation which had not fulfilled statutory conditions precedent to right to do business in the state, a variance as to the foreign state under which it is incorporated is immaterial.
 6. Where a party alleges that a certain corporation is incorporated under the laws of a state "beyond the limits of this state" and identifies it as the same corporation referred to by the opposing party, he cannot object to proof that it was incorporated in a foreign state other than that averred by his opponent; such proof being responsive to his own pleading.
 7. A foreign corporation's purchase of negotiable securities outside the state is not doing business within the state, within statutes requiring such corporation to file certificates, copy of charter, etc., before being authorized to transact business in the state.
 8. The grantee of an equity of redemption cannot occupy any better position in relation to the mortgage than that of his grantor.

Appeal from District Court, Arapahoe County.

Suit by Mamie E. Miller against Frederick A. Williams and another.
From a decree for defendants. Plaintiff appeals. Affirmed.

Arthur S. Miller, for appellant. Frederick A. Williams, pro se.

CAMPBELL, C. J.:

Action to quiet title to real estate. Arthur S. Miller is the common source of title. The defendants claim as purchasers at a foreclosure sale of a trust deed given by him in 1890; the plaintiff, as the grantee in a quit claim deed executed by him in 1895. From a judgment in favor of the defendants the case comes here on appeal; and, of the numerous errors assigned and argued, some are not properly preserved in the record, and we cannot notice them. Those which the appellant is in a position to urge are considered, and in their appropriate place the material facts are stated in the opinion.

353 1. The trust deed, as well as the notes thereby secured, bears date June 11, 1890. The acknowledgement of the grantor was taken on the following day. Thereafter, and on the 14th of June, the date of the notary's certificate appears to have been changed from the 12th to the 14th. It is upon this apparent change of date that the appellant makes the point that the instrument bearing evidence of alteration was improperly admitted in evidence. It is sufficient to say that there was testimony before the court to the effect that the notes and the trust deed were not delivered until the 14th day of June, and that the change in date was made with the consent of the parties to these instruments. Though there was evidence to the con-

trary we are not disposed to interfere with the finding below in defendants' favor.

2. The trust deed provided, inter alia, that in case F. M. Hamilton, the Trustee and Charles C. Culp, the successor in trust should die or be absent, or be unable or refuse to act, then the legal holder of the notes might, in writing, appoint some attorney of record residing in the state of Colorado as the successor in trust, with the same powers originally granted to and possessed by his predecessors. Against the protest of the plaintiff, the defendants introduced in evidence certain writings, purporting to be the resignation and refusal to act of the trustee and successor in trust, and a further writing by which F. A. Williams was appointed by the holder of the note as successor. The objection was that there was no proof of delivery. At the trial they were in possession of the party claiming under them. *Prima Facie*, they were delivered at the time they bear date; and, if that is so, they were admissible in evidence. As there is an absence of a contrary showing, this presumption was not overcome. It was further objected that the paper denominated the resignation of F. M. Hamilton as trustee, and also that of Charles C. Culp as successor, are void for uncertainty. There is no merit in the objection. These instruments sufficiently identify and make plain that the persons named intended to and did resign the respective offices of trustee and successor in trust under the trust deed in question. But it is also said that prior to the time when under a deed of trust a trustee may be called upon by the beneficiary to act in the matter of foreclosing the same, he may not resign his office, if he has once accepted it.

354 To this point is cited *Barstow v. Stone*, 10 Colo. App., 396, 405 52 Pac. 48. That case goes to the point that a trustee must strictly conform to the provisions of the instrument appointing him; that he can act only on request of the beneficiary, and in no event until default and that a successor in trust may act only upon the happening of some contingency therein provided. There is not a word in, or an inference from, the opinion to the effect that a trustee may not resign before the time when he may be called upon by the beneficiary to act in the foreclosure of the trust deed. As well might it be contended that a trustee may not die or permanently remove his residence, so as to permit the appointment of a successor, until the beneficiary requests him to act. The act which the trustee is powerless to do without the request of the beneficiary pertains to the foreclosure for a default of the trustor. He may resign or permanently remove without the consent or request of any one, and before or after default; and, if he does, his successor steps into the vacancy.

3. The trust deed provides that upon default, and the application of the legal holder of the notes, the trustee or successor in trust shall advertise and sell. The point is made that neither the holder of the notes, nor his legal agent thereunto authorized by writing, directed a sale. We think the record sufficiently shows a valid request by the duly-constituted agent of the holder of the notes, and that his action in doing so was ratified by his principal.

4. The principal objection urged is that the payee of the note and

the beneficiary in the trust deed, the Hamilton Investment Company is a foreign corporation, and, when the transaction occurred, had not filed in the proper offices certain certificates and a copy of its charter, etc., required by sections 499-501, 1868, Mills' Ann. St. (Gen. St. 1883, Secs. 251, 261, 265, Sess. Laws 1887, p. 406), and that the Massachusetts Mutual Life Insurance Company, assignee of the notes, was likewise derelict in duty before it acquired title. What the consequences of such failure are, under the constitution and laws of this state, has been the subject of inquiry by our courts, and by other courts under similar provisions, in these, among other, cases:

355 Utley v. Mining Co., 4 Colo. 369; Kindel v. Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; Tabor v. Manufacturing Co. 11 Colo. 419, 18 Pac. 537; Manufacturing Co. v. Ferguson, 113 U. S. 732, 5 Sup. Ct. 739, 28 L. Ed. 1137; Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; Insurance Co. v. Rogers, 9 Colo. App. 121, 47 Pac. 848; Helvetia Swiss Fire Ins. Co. v. Edwards P. Allis Co., 11 Colo. App. 264, 53 Pac. 242; In re Comstock, 3 Sawy. 218, 227, Fed. Cas. No. 3,077; Insurance Co., v. Thomas, 46 Ind. 44; Thorne v. Insurance Co., 80 Pa. St. 15; Insurance Co. v. Stoy, 41 Mich. 385, 1 N. W. 877; Darrior v. Security Co. 88 Ala. 275, 7 South 200; Dudley v. Collier, 87 Ala. 431, 6 South 431; Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743. Our attention, however, is called to the case of Jones v. Hardware Co. 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, which is claimed to be decisive of this case in favor of the appellant. We do not find it necessary to determine the proposition argued, for the facts of the case do not call for an interpretation or construction of the constitution and statutes in question. If there was a compliance by the investment company with their directions, it is immaterial what might be the consequences of its failure in that particular. The record shows that the Hamilton Investment Company complied with the statutes by making the necessary filings and performing the prescribed acts on the 14th day of June, 1890, before the notes and trust deed were delivered, though on the same day. It is true, appellant insists that this was subsequent to the date of these instruments; but, as already indicated in another connection, there was proof to show that these instruments were not delivered and the money was not paid until after the company complied with the statutes. We are, however, met with the further objection that the record proof offered by defendants from the office of the secretary of state and of the county clerk of Arapahoe county shows that the corporation which thus complied was a foreign corporation organized under the laws of Kansas. The pertinency of this objection will be seen when it is stated that in the answer the allegation is that the Hamilton Investment Company is a corporation organized under the laws of Missouri. Having made this allegation in the answer, the plaintiff contends that defendants were estopped to show that the corporation was organized under the laws of Kansas, and that there was a fatal variance between the proof and the allegations of the answer. We are clearly of opinion that under the facts of this case the variance is not only an immaterial one, but the plaintiff is not in

a position, if it were material, to take advantage of it. It should be distinctly borne in mind that the substance of the objection we are now considering is that the notes and trust deed are void because the payee and beneficiary therein was a foreign corporation which had not complied with certain preliminary conditions of our statutes which must be met before it is entitled to do any business in this state. This consequence attaches, not because the foreign corporation is one whose domicile is in Missouri, but the same result follows whatever be the state, other than Colorado, under whose laws it was incorporated. That is to say, it was not within the power of a corporation of any foreign state, territory or country to receive this note, or to acquire any interest in real estate in Colorado through this trust deed, because it could transact no business of that character; hence, the instruments are absolutely void. It therefore follows that, if the facts and the law are as the plaintiff claims, the failure to comply with the statute is a sufficient defense to a suit on the notes, and renders invalid any proceeding to enforce payment, whether the payee and beneficiary was a Missouri or Kansas corporation, and the converse of the proposition is equally true;—That if the law does not visit such consequences upon this failure, or if the fact should be that the foreign corporation, wherever organized, had complied with the statute, the objection would not be tenable. For this reason the variance is immaterial. But even, if it were, the plaintiff may not insist upon it; for in her replication she admits the execution of the notes and the trust deed to the Hamilton Investment Company, as alleged in the answer, but says that they are void because that company was at the time of the transaction of the business in question "a foreign corporation incorporated under the laws of a state of the United States beyond the limits of this state, * * * but the said Hamilton Investment Company had at the time of procuring said trust deed and said notes, and at the time of transacting the business relating thereto, no known place of business in the state of Colorado, and no authorized agent in the same upon whom process could be served, and the said the Hamilton Investment Company had not at the time of procuring said notes and trust deed, and at the time of the transaction of said business, filed in the office of the secretary of this state, a copy of its charter," etc. It thus clearly appears that

357 in her own pleading plaintiff identifies the corporation which took the notes and the trust deed as the same corporation described in the answer, and there can be no question that the corporations spoken of by the plaintiff and the defendants are one and the same. Having, therefore, in her replication alleged that the Hamilton Investment Company took these notes and trust deed; that it was a corporation organized under the laws of some state other than Colorado, which, of course, includes the state of Kansas; and that it had not complied with the statutes of Colorado, compliance with which gives it the right to do business therein—the record proof offered by plaintiff, that the very corporation spoken of by both parties, and which was organized under the laws of Kansas, had fully complied with our laws, was strictly responsive to the allegation of the replication, and constituted no variance under the issues joined. If the

issue to which this proof was responsive was not tendered in the answer, it certainly was in the replication; and, having done this herself, the plaintiff may not now be heard to complain because the trial court heard evidence upon it. In this connection, we cannot withhold adverse comment upon the action of defendants' counsel when the objection of a variance was raised. Common prudence would have dictated that he should ask to amend the answer to correspond to the proof; and the amendment would have been allowed, as plaintiff could not have been surprised, because both the notes and trust deeds described the company as a Kansas corporation. This course would have saved this court much time, not only in reading and considering the arguments of counsel, but in making an independent examination of the pleadings, which revealed the tender of an issue by the plaintiff *the obviated* the objection urged. As to the point that the Massachusetts Mutual Life Insurance Company, to which the notes were transferred long before their maturity, was, for similar reasons, without capacity to take or hold property in Colorado, it is necessary merely to say that, under the doctrine of the cases already cited, this one act of requiring these negotiable securities which seems to have taken place in the state of Massachusetts would not be doing business here in such a sense as to bring the case within the purview of the statutes requiring foreign corporations

358 to do certain things before they are authorized to transact
business in this state. In arriving at this conclusion, we must
not be understood as holding that the record does not establish
the right of this company, under these statutes, to enforce its
rights by a suit in the courts of this state. Other propositions upon
which similar cases have been decided have not been overlooked,
such as that the plaintiff, having dealt with the corporation, and
having obtained its money, is estopped to deny its corporate capacity
to enforce by suit the obligations assumed; but we have not been
obliged to rest our decision upon any other ground than those given.
Neither has the fact, alluded to by plaintiff, escaped us,—that the
plaintiff was not the maker of the notes or the trust deed. That circum-
stances, however, does not alter the relation of the parties. By
her deed, plaintiff took merely the equity of redemption which her
grantor had. Stephens v. Clay, 17 Colo. 489, 30 Pac. 43. As was
said by Mr. Justice Harlan in Fritz v. Palmer, *supra*, at page 289,
132 U. S. page 95, 10 Supreme Court and page 320, 33 L. Ed. upon
a somewhat similar point, a plaintiff who is grantee of an equity of
redemption "cannot, in law, occupy any better position than the
original grantor would have done if he had himself brought the
action." Perceiving no substantial error, the judgment and decree
of the lower Court are affirmed. Affirmed.

359

(30 Pac. Rep., 42-43.)

(Court of Appeals of Colorado, May 23, 1892.)

FARMERS' & MERCHANTS' INS. CO.v.
NIXON.**Insurance—Waiver of Conditions.**

In a suit on a fire insurance policy defense was made that a gasoline stove was used in the building insured, though prohibited by the policy. This prohibitory clause was waived by the agents writing the insurance, who knew of the use of gasoline on the premises, and subsequent agents, though aware of its use, did not cancel the policy. Held, that the insurance company was bound by the waiver and acquiescence of its agents.

Appeal from the district court, Yuma county; S. S. Downer, Judge.

Action by G. B. Nixon against the Farmers' & Merchants' Insurance Company on a policy of fire insurance. Judgment for plaintiff, and defendant appeals. Affirmed.

Montgomery & Frost, for appellant.

REED, J.:

Appellant insured a building used as an hotel, the policy running to appellee. The property was destroyed by fire. Suit was brought to recover the insurance; trial had to a jury; verdict for plaintiff in the sum of \$200 and interest; judgment on the verdict. There was no question in regard to the origin of the fire. An open vessel of gasoline for replenishing the fire was brought in by a servant. It took fire, and the building was consumed. The defense was based upon the fact that a gasoline stove was used in the building for cooking; that by the terms of the policy the use of gasoline was prohibited, and that such use of it rendered the policy void. It was contended by the plaintiff that the use of gasoline was known to the agents of the company who effected the insurance at the time of insuring, and that the provision was waived, and that subsequent agents knew the fact, acquiesced in its use, and did not cancel the policy. This was denied by appellant. The testimony was rather conflicting, but the jury found the issue for the plaintiff and that

is conclusive. Several errors are assigned on the admission
360 of testimony. No specific objections to the admissibility of it were made, nor proper exceptions saved; hence the assignments will not be considered. See Higgins v. Armstrong, 9 Colo. 57, 10 Pac. Rep. 232; Gilpin v. Gilpin, 12 Colo. 517, 21 Pac. Rep. 612; Ward v. Wilms, 16 Colo. 86, 27 Pac. Rep. 247. It is contended that the court erred in refusing the instruction asked by the appellant

and in those given. It is insisted that the local agents had no authority to waive the condition; that, if it was waived by the agent, the waiver having been by parol, and the policy containing no waiver, it was inoperative; and that it was error to submit the question to the jury. We do not so regard it. In *May, Ins. Sec. 126*, it is said: "A person authorized to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by issuing and renewing policies, must be regarded as a general agent of the company pending negotiations; * * * and the possession of blank policies and renewal receipts signed by the president and secretary is evidence of such agency." See *Insurance Co. v. Friedenthal*, 27 Pac. Rep. 88, (in this court, not yet officially reported); *Pitney v. Insurance Co.*, 65 N. Y. 6; *Post v. Insurance Co.*, 43 Barb. 357; *Carroll v. Insurance Co.*, 40 Barb. 292. Authorities are numerous that a general agent can waive any condition inserted in the provisions of a policy of insurance. See *Joliffe v. Insurance Co.*, 39 Wis. 117; *Insurance Co. v. Fennell*, 49 Ill. 180; *Washoe Tool, etc., Co. v. Hibernia Fire Ins. Co.*, 66 N. Y. 613; *Putnam v. Insurance Co.*, 18 Blatchf., 368, 4 Fed. Rep. 753; *Elkins v. Insurance Co.*, 113 Pa. St. 386; 6 Alt. Rep. 224; *Ball, etc., Wagon Co. v. Aurora, etc., Ins. Co.*, 20 Fed. Rep. 232; *Insurance Co. v. Swigert*, 11 Ill. App. 590. And such rule seems well founded in reason and justice. The agent should not be allowed to waive a provision in order to secure business and obtain the money of the insured, and knowing the violation of the provision, acquiesce in it as long as no damage occurs, and, when damage occurs, insist upon the provision and 361 the want of authority in the agent to waive it. The instructions were warranted by the evidence and in accord with the rules above stated, and, the issues of fact having been found for the appellee by the jury, the judgment is affirmed.

(Supreme Court of Colorado, Feb. 3, 1908.)

GERMAN AMERICAN INS. CO.
v.
HYMAN.

GERMAN AMERICAN INS. CO.
v.
SAME.

1. Insurance — Condition Subsequent — Breach—Waiver—Knowledge of Agents—Permit to Tenants—Landlord's Insurance.

Defendants issued policies of insurance on plaintiff's building, conditioned to be void if any illuminating gas or vapor be generated in the building, or if any benzine or gasoline be allowed on the premises. It was stated in the policies that they were accepted subject to those conditions, and that no representative of the insurers had power to waive any provisions or conditions, except such as by

the terms of the policies may be the subject of the agreement indorsed thereon or added thereto, and such waiver must be written on or attached thereto. Tenants of the building subsequently insured their stock of goods kept therein with one of defendants; the insurance being placed by the same agents. The agents, without plaintiff's knowledge, issued to the tenants a permit to install a device for the generation of gasoline vapor, and the same was installed without plaintiff's knowledge. The building was subsequently damaged by fire and explosion. Held, that the installation and use of the gasoline plant did not render plaintiff's policies void, as the knowledge of the agents, who were general agents for defendants, that the plant had been installed based on their consent to its installation, is the knowledge of defendants, and constitutes a waiver of the condition in the policy.

(ED. NOTE.—For cases in point, see Cent. Dig. vol. 28, Insurance §§968-974.)

2. Same—General Agents—Power to Waive Conditions.

Agents furnished with blank policies signed by the president and secretary of the insurance company, with authority to fill out the same, solicit insurance, receive applications and premiums, issue, countersign, renew and cancel policies, are general agents, and may modify the contract of insurance, although it provides that no agent shall have power to waive any restrictive clause, except where expressly authorized and in those cases to be waived by writing or attaching the waiver to the policy.

(ED. NOTE.—For cases in point, see Cent. Dig. vol. 28, Insurance §§952, 953.)

3. Same—Knowledge of Agents—Permits to Tenants—Presumptions.

Where a permit is issued to tenants by insurance agents to do that which is forbidden in policies issued by the same agents to the landlord, it will be presumed, in spite of the testimony to the contrary of the agent actually granting the permit, that they had in mind at the time the policies issued to the landlord.

(ED. NOTE.—For cases in point, see Cent. Dig. vol. 28, Insurance §1658.)

4. Same—Waiver of Forfeiture.

Provisions in an insurance policy rendering it void if 363 specified articles are kept on the premises are for the benefit of, and may be waived by, the insurer.

(ED. NOTE.—For cases in point, see Cent. Dig. vol. 28, Insurance §941.)

5. Same—Knowledge of Breach of Condition—Action of Insurer.

Where an insurer has knowledge of a breach of condition, but continues to treat the policy as operative, it will continue in full force, whether the breach results from any direct action of the insurer.

(ED. NOTE.—For cases in point, see Cent. Dig. vol. 28, Insurance, §1038.)

6. Same—Act of Tenant—Knowledge of Landlord—Knowledge of Insurer.

Where act forbidden by a landlord's insurance policy is done by his tenant, the landlord may enforce the policy if the act was done without his knowledge and consent, but with the knowledge and consent of the insurer.

(ED. NOTE.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§977-992.)

7. Same—Actions on Policies—Conditions Precedent—Reformation of policy.

Where an insurer in an action on the policy pleads forfeiture for violation of a restrictive clause, the insured may plead waiver or estoppel without first having the contract reformed so as to embody the waiver.

(ED. NOTE.—For cases in point, see Cent. Dig. vol. 28, Insurance, §1020.)

8. Same—General Agents of Two Companies—Effect of Notice to Agents.

Where two insurance companies represented by the same general agents are in reality one and the same company, permission by the general agents acting for one company to a tenant to keep articles on the premises forbidden by his policy on goods in the building amounts to notice to the other company and waiver by it of a condition in a policy issued on the building to the landlord forfeiting the policy if those articles are kept on the premises.

(ED. NOTE.—For cases in point, see Cent. Dig. vol. 28, Insurance, §972.)

9. Same—“Estoppel in Pais”—Waiver.

Estoppel in pais is recognized in law as well as in equity, and is employed in insurance law as synonymous with waiver.

(ED. NOTE.—For other definitions, see Words and Phrases, vol. 3, pp. 2497-2508; vol. 8, p. 7655.)

364 10. Same—Causes of Loss—Fire—Explosion.

A fire insurance policy provided that the insurer would not be

liable for loss by explosion. Held, that, if a fire precedes an explosion and the latter is an incident of the former and caused by it, insured may recover for his entire loss, but if the explosion precedes the fire, and is not caused by it, insured can only recover for the loss by fire.

(ED. NOTE.—For cases in point, see Cent. Dig. vol. 28, Insurance, §1126.)

11. Same—Actions on Policies—Questions for Jury—Precedence of Fire or Explosion.

Where there is both a fire and an explosion, the question of precedence is for the jury in an action on an insurance policy.

(ED. NOTE.—For cases in point, see Cent. Dig. vol. 28, Insurance, §1762.)

12. Same—Burden of Proof—Cause of Loss.

When assured has shown the execution of the policy, the loss and amount thereof, and notice to the insurer, the burden is on the insurer to prove that the loss or a part thereof is within one of the exceptions in the policy.

(ED. NOTE.—For cases in point, see Cent. Dig. vol. 28, Insurance, §1660.)

13. Same—Evidence to Sustain Finding—Cause of Loss.

Evidence in an action on an insurance policy considered, and held insufficient to sustain the finding of the court that a fire preceded the explosion, and was the cause of the explosion.

14. Same—Cause of Loss—“Fire” Causing Explosion.

A fire causing an explosion and rendering an insurer liable for the damage caused by the explosion under a policy excluding explosions as causes of loss must be an actual fire according to the common use of the term, and not a blaze produced by lighting a match, gas jet, or lamp.

(ED. NOTE.—For other definitions, see Words and Phrases, vol. 3, pp. 2814-2816.)

15. Same—Actions on Policies—Extent of Damage—Burden of Proof.

Where a policy of insurance excludes damages caused by explosion, and the insurer in an action thereon proves that an explosion preceded the fire, the burden is on plaintiff to prove the extent of the damages suffered from the subsequent fire.

(ED. NOTE.—For cases in point, see Cent. Dig. vol. 28, Insurance, §1660.)

Appeal from District Court, Lake County, Frank W. Owers, Judge.

Action by Hymam against the German American Insurance Company and the German Alliance Insurance Company. Judgment for plaintiff, and defendants appeal. Reversed.

365 These causes were consolidated for trial in the court below. They were argued together in this court, and are determined by one opinion. Appellee, Hyman, who was plaintiff below, was the owner of a certain brick store building on Harrison avenue, in the city of Leadville. On August 1, 1901, and on April 28, 1902, Wright & Stotesbury, agents of the appellant insurance companies, who were defendants below, issued two him two policies of fire insurance for \$2,000 each in said companies, respectively. These policies were the same in form, and were what is known as "New York standard policies." Each, contained the following amount other, conditions:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if * * * illuminating gas or vapor be generated in the described premises (or adjacent thereto for use therein)."

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if * * * there be kept, used or allowed on the said above described premises benzine, gasoline * * * or petroleum, or any of its products of greater inflammability than kerosene oil."

"This company shall not be liable for loss caused directly or indirectly by invasion * * * or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind."

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of the agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have power to waive such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto,

nor shall any privilege or permission affecting the insurance
363 under this policy exist or be claimed by the insured unless so written or attached."

The ground floor of the building was occupied as a clothing store by Sands Bros., tenants of the plaintiff. About the 26th of May, 1902, Wright & Stotesbury also issued to them a policy in the German American Insurance Company on their stock of goods. This policy was similar in form to those issued to Hyman. Subsequently, and about June 21, 1902, at the request of Sands Bros., Wright & Stotesbury attached to their policy a written permit for the installation of a certain specified apparatus and device for the generation and use of the vapor of gasoline for lighting purposes on the prem-

ees. This apparatus or plant either had already been or was at once installed in the back part of the storeroom. Neither Sands Bros. nor Wright & Stotesbury communicated to Hyman any knowledge of the granting of said permit to Sands Bros. Nor did Hyman have any knowledge until after the fire either of the granting of such permit or of the installation of the gasoline lighting plant upon the premises. Hyman's policies remained apparently in full force, and without any intimation from Wright & Stotesbury or otherwise, until after the explosion and fire, that defendants intended to disclaim liability thereunder. About 9.30 p. m. on the evening of July 3d the building was seriously damaged by fire and explosion. As to whether the explosion took place first and the fire afterwards, or whether the fire preceded and the explosion was an incident thereto, is a matter upon which the parties differ in their conclusions drawn from the evidence. Appellants contend that the explosion occurred first, and that the fire resulted therefrom. Appellee contends that the fire was first and the explosion afterwards, as an incident thereto. Substantially all of the evidence in relation to this specific subject is included within the testimony of three witnesses, Carlson, Snyder, and Coble. This testimony is sufficiently stated in the opinion. As to the extent of the damages, there is some conflict of evidence.

But the court below who tried the case, a jury being expressly waived, found the total amount thereof to be in excess of the \$4,000 covered by the two policies. There was also evidence upon the subject of the relative proportions of the loss due to the explosion and to the fire, respectively. A witness for plaintiff, having fixed the total loss at \$4,082.05, on rebuttal attributed one-third of that sum to the explosion. One of defendants' witness places the extent of the damage from the explosion at \$1,600, and from the fire at \$1,450. Another of defendants' witnesses estimates the total damages at \$3,800 and the loss by fire at \$1,769.80. But the trial court evidently adopted the view that the fire preceded the explosion, and that the explosion was an incident thereto, and rendered judgment for the full amount of the policies, holding that the entire injury proximately resulted from the fire.

Sylvester G. Williams, for appellant. Fillius & Davis, for Appellee.

HELM, J. (after stating the facts as above):

1. The first ground relied on for a reversal of the judgment below is that both of the policies in suit were rendered wholly void by the installation and use of the gasoline lighting plant in the building insured; each of said policies prohibiting the generation and use of gasoline vapor on the premises without the consent of the insurer in writing. Wright & Stotesbury represented both defendants in the city of Leadville. They were furnished with blank policies of insurance duly signed by the president and secretary, with authority to fill out and issue the same. They had power to solicit insurance, to receive applications and premiums, to issue, countersign, renew, and cancel policies in that district. They were there-

fore general agents of the companies, and possessed all the authority devolved by law upon such agents. Acting in that capacity, they issued both policies to plaintiff, and also issued the policy to Sands Bros., who were tenants of plaintiff. The action of Wright & Stotesbury in suspending the operation of the gasoline provision in Sands

Bros.' policy is not challenged. Defendants themselves make
368 no objection in this regard. They admit that the agency was

sufficiently broad for such purpose; and it is not questioned but that Wright & Stotesbury could also have suspended the similar provision in both of plaintiff's policies had they been requested by him so to do. But plaintiff did not make this request for the very obvious reason that he had no notice or knowledge of the suspension of the gasoline provision in the policy taken out by his tenants, or that a gasoline plant had been installed and was in use on the premises. Yet it is insisted on behalf of defendants that the installation of the gasoline plant rendered both of plaintiff's policies void; he having failed to apply to Wright & Stotesbury and procure a suspension of the gasoline clause therein, and that for this reason he is not entitled to recover anything in the present action. That such a view would, under the circumstances, result in gross injustice as well as hardship to plaintiff, must be admitted; and, unless coerced by cogent and powerful authority so to do, we are not disposed to adopt the same. The innocence and good faith of plaintiff are not impugned. No bad faith is in any manner imputed to him. He is not even charged with negligence; and, relying on the honor and integrity of defendants and their agents he honestly supposed his policies invulnerable until they were challenged after the fire. At the time of granting the suspension of the gasoline provision in Sands Bros.' policy, as well as when issuing the same, Wright & Stotesbury may fairly be presumed to have had in mind the policies previously issued to plaintiff. It is true Stotesbury testifies that, when granting the gasoline permit to the tenants, it did not "occur" to him that plaintiff had policies of insurance on the building; also, that this fact did not "occur" to him until after the fire. But Wright & Stotesbury solicited plaintiff's insurance, and issued his policies themselves. From the date of issue to the second policy to plaintiff till the issue of Sands Bros.' policy upon the goods in plaintiff's building less than four weeks intervened, and less than seven

369 weeks passed between the former date and the suspension of the gasoline provision in the latter policy. Wright & Stotesbury were constantly dealing with this class of policies, and were familiar with the gasoline clause uniformly included therein. They must be regarded as aware of the fact that in suspending or waiving this provision they were sanctioning the violation of plaintiff's contracts by his tenants.

It is suggested by counsel in argument that Wright & Stotesbury had no actual knowledge of the fact that their permission was utilized by installation of the gasoline plant. But this, if true, would not be significant, for in granting the permission they must be held to have anticipated the installation. Besides, Stotesbury says, when speaking of the party who applied for the suspension of the gasoline

clause. "I knew he would not come in and ask for that permit, unless the plant was in there." Had Wright & Stotesbury notified plaintiff or in any manner called his attention to the suspension of the gasoline provision in his tenants' policy, he would undoubtedly have at once required the removal of the plant, or have made application for a like suspension in the two policies issued to him. And we may assume that such application would have been promptly granted. Counsel for defendants pronounce this assumption a "fallacy." He says that "it is quite as likely" that plaintiff's application, had he made one, would have been refused. He further says "the company had the right to terminate either or both of these policies by cancellation." That is to say, the company through its authorized agents first issues the policies for \$4,000, receiving from the owner of the building the premiums, and retaining the same. It then by and through the same identical agents gives the tenants permission to install a gasoline plant in the building, which act, without a like permission to the landlord, renders his insurance void. Yet it is denied that there was any legal obligation to comply with the landlord's request, had he made such request, for a like suspension of the gasoline provision in his policies. We are not prepared to accept this view of the law. We do not think it has yet received judicial

370 sanction, and are unwilling to take the initiative in giving such sanction. The knowledge of Wright & Stotesbury was the knowledge of the defendant companies; and their action under the circumstances may be presumed to have been the action of those companies. Whatever view we would adopt were Wright & Stotesbury themselves the insurers must therefore be adopted with reference to these defendants. Restrictive provisions like the one under consideration are inserted into these contracts for the benefit of the insurer. Forfeitures are not favored in law, and the party for whose benefit they are inserted may always decline to insist upon them. Besides, the fact that these particular insurers intended to sometimes suspend or waive the present ground of forfeiture is shown by the insertion of an express provision for so doing. If the action of plaintiff-tenants could, under the circumstances, operate as a forfeiture of plaintiff's policies because of a violation of the gasoline provision therein contained, it was the duty of defendants to notify him of such forfeiture, and either suspend the forfeiture provision in his policies or, if he failed to request such suspension, at least to cancel those policies altogether and inform him of such cancellation. Defendants cannot, under the circumstances, be permitted to remain silent, treating the policies as valid and binding contracts until a fire occurs and then assert the invalidity of such contracts; for if the insurer has knowledge of a breach of a condition in the policy, but treats it as still operative and valid by failing to assert the right to forfeit and cancel the same, the policy will continue in full force and effect. *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 78 N. W. 936, 76 Am. St. Rep. 111; *Hamilton v. Home Ins. Co.* 94 Mo. 368, 7 S. W. 261; *Van Borles v. United Life F. & M. Ins. Co.* 8 Bush. (Ky.) 133; *Cromwell v. Phoenix Ins. Co.*, 47 Mo. App. 109; *Pollock v. German Fire Ins. Co.* 127 Mich. 460, 86 N. W. 1017; *Dick v. Equit. Fire &*

M. Ins. Co. 92 Wis. 46, 65 N. W. 742; Phenix Ins. Co. v. Hart, 149 Ill. 521, 36 N. E. 990; Viele v. Germania Ins. Co. 26 Iowa, 9, 96 Am.

Dec. 83. Such is the rule even where the forfeiture takes the place entirely independent of any agency of the insurer or its representative. How much more strictly should this rule be applied where, as in the present instance, the alleged forfeiture results from the direct and affirmative action of the insurer's duly accredited agent?

In the case at bar the alleged violation of the prohibitory clause of the contracts occurred subsequent to the issuing of the policies sued on. But the rule of waiver, or, in some instances, where the facts justify, of estoppel, is also, applied even to cases where the general agent of the insurer has knowledge of the violation of or conduct with such prohibitory clause at the time of issuing the policy; that is to say, the principle is even likewise applied to cases where the breach exists at the very inception of the contract. In Pomeroy v. Rocky Mountain Ins. & Savings Inst., 9 Colo. 295, 12 Pac. 153, 59 Am. Rep. 144, the facts were that, after a policy of life insurance had been forfeited for nonpayment of dues, the general agent of the insurance company permitted the same to be reinstated. When he granted such reinstatement, the agent was fully apprised of the assured's impaired health through intemperance, a condition that rendered the policy void. This court denied the insurer's contention that the policy was thus rendered nugatory, and sustained the recovery thereon. At page 301 of 9 Colo., page 156 of 12 Pac. (59 Am. Rep. 144,) the following language is employed: "Johnson, having permitted the renewal of the policy and its issuance with full knowledge of Barton's impaired health by reason of his intemperate habits, * * * having at the time received from plaintiff payment of all back dues necessary to its renewal, and thereafter payment of premiums on the policy as they became due, is to be regarded as having waived the condition respecting the impairment of health of the insured by intemperate habits. The company cannot be allowed to treat the contract as valid for the purpose of collecting dues and as void when it comes to paying the insurance; or, as otherwise stated, "the company cannot be permitted to occupy the vantage

372 ground of retaining the premium if the party continued in life, and repudiating it if he died." Bank v. Life Ins. Co. 52 La. Ann. 36, 26 South, 800; Geo. Home Ins. Co. v. Kinnier's Adm'x 28 Grat. (Va.) 88; Shafer v. Phenix Ins. Co. 53 Wis. 361, 10 N. W. 381; Phenix Ins. Co. v. Hart, 149 Ill. 513, 36 N. E. 990; Improved Match Co. v. Insurance Co. 122 Mich. 263, 80 N. W. 1088; R. I. Underwriters Ass'n v. Monarch, 98 Ky. 308, 32 N. W. 959; Mutual Ins. Co. v. Ward, 95 Va. 231, 28 S. E. 209. Nor does the presence of a provision in the policy that no officer or agent shall have power to waive any of the restrictive clauses except where such waiver is expressly authorized, or that such waiver, when permissible, shall in no case be effective unless written upon or attached to the policy, change or modify the foregoing conclusions. The general agent's power to make and rescind contracts implies the power to modify the same. The insurer is estopped from asserting a for-

feiture on the ground of such agent's want of authority to waive the forfeiture or because of absence of the formal written indorsement upon the instrument suspending the prohibitory provision. Farmers' & Merchants Ins. Co. v. Nixon 2 Colo. App. 266, 30 Pac. 42; Northam v. International Ins. Co. 45 App. Div. 177, 61 N. Y. Supp. 45; Niagara Ins. Co. v. Lee, 73 Tex. 641, 11 S. W. 1024; Phenix v. Munger, 49 Kan. 194, 30 Pac. 120, 33 Am. St. Rep. 360; James v. Mutual Ass'n 148 Mo. 10, 49, S. W. 978; Phenix Ins. Co. v. Hart, *Supra*; Dick v. Equit. F. & M. Ins. Co. *supra*; Shafer v. Phoenix Ins. Co. *supra*; Viele v. Germania Ins. Co. *supra*; Lamberton v. Insurance Co., 39 Minn. 129, 39 N. W. 761, L. R. A. 222.

The principle urged by defendants, and sometimes recognized that the assured cannot maintain his action by showing that the violation of the contract was an act of his tenant without his consent or knowledge; has no application to the case at bar. Plaintiff in this case does not rely solely upon the fact that the alleged violation of his policies resulted from the act of his tenants. The principle mentioned applies only where the tenant without the consent or approval of the insurer commits some act in derogation of his landlord's policy. No court would hold the same applicable to a case 373 where the insurer, without notice to the landlord, expressly gives the tenant permission to commit the act forbidden by the landlord's policy. To so hold would be to sanction a gross injustice and open the door to fraud. It would be to announce a rule inconsistent with the authorities, and sure to create universal surprise and protest.

Nor is the argument advanced by defendants sound that plaintiff must first go into equity, and have the contracts reformed so as to embody the waiver or suspension of the prohibitory clause in question. When to plaintiff's action upon the contract the insurer pleads a forfeiture for violation of a given restrictive clause thereof, plaintiff may plead in reply facts constituting a waiver of such forfeiture or an estoppel with reference thereto. This is not bringing in by replication a new and different cause of action. There is no attempt to reform the policy and rest the recovery upon a new or different contract. The action remains upon the original contract. The replication simply shows that defendant has no right to plead or rely upon the alleged violation of that contract. And, if plaintiff recovers, he recovers upon the contract as it was originally written. Defendant simply is not allowed to establish the asserted forfeiture or violation, and thus defeat the recovery. This view is not inconsistent with Thompson v. White, 25 Colo. 226, 54 Pac. 718, cited by defendants. In that case the action was originally brought against two individuals. The replication attempted to plead ground for relief against a partnership. And it is needless to say that a right to recover against an individual and a right to recover against a partnership are two separate and distinct causes of action. We have not deemed it necessary in the foregoing discussion to consider the distinction based upon the status of the two defendant companies urged by their counsel. This alleged distinction rests upon the fact that the suspension of the gasoline provision was made by the German Ameri-

374 can Company by which Sands Bros.' policy was issued, and that the German Alliance Company issued no policy to Sands Bros. and itself granted no suspension of a gasoline restriction in any such policy. The conclusion may fairly be drawn from the evidence that defendants, while separate corporate entities and with slightly different names, are in reality one and the same company; or at least that for the purposes of determining the present question they should be treated as if they were the same company. The German Alliance was called the "baby Company" of the German American. The two companies were "associated together in their operations." Wright & Stotesbury were appointed agents "under the same authority" and they "made reports to the same persons back in New York." When asked if he did not inform plaintiff that they "were practically one and the same company," Stotesbury was not prepared to say that he did not. Jessup, the adjuster, was also the agent of both companies, with broad and extensive powers. He represented them both after the fire in negotiations with plaintiff for a settlement under both of the policies. Moreover, Wright & Stotesbury were, as we have seen, the general agents of both of these companies. Their knowledge and conduct were the knowledge and conduct of the companies. And we have no hesitancy in declaring that good faith required them to notify plaintiff of the permission granted his tenants to install the gasoline plant and give him an opportunity to cause its removal, or to apply for like authority under his policies. In view of all the circumstances, the action of Wright & Stotesbury in granting the Sands Bros.' application, without notice to plaintiff, operated as a waiver or as an estoppel on the part of both defendants. They could not remain silent, allowing plaintiff to rest securely in the belief that his policies were good, until the property was destroyed by fire, and then assert the invalidity thereof.

It may be proper to suggest, in this connection, that estoppel in pais, like waiver, is recognized at law as well as in equity; also, that waiver and estoppel in pais are often employed in insurance law as synonymous terms, and used indiscriminately. Counsel, for 375 plaintiff urge that the conduct of Jessup, the adjuster, while acting for defendants after the fire, constituted a waiver of the forfeiture, if a forfeiture took place. There is plausibility in this contention, viewed in the light of some of the recent and able decisions. But in view of the foregoing conclusion, it is unnecessary for us to consider this subject in the present opinion. And we prefer to leave the same open for full investigation and decision at some future time.

2. We come now to the second proposition urged by defendants for a reversal of the judgment under consideration. Plaintiff's policies contained, among other provisions, a declaration that the insurer would not be liable for loss caused directly or indirectly by explosion of any kind, unless fire ensued, and in that event for damage by the fire only. The evidence clearly shows that a portion of the damages suffered resulted from the explosion. And defendants contend that, by virtue of the above provision in the policy, they are at least relieved from liability for this part of the loss; that, at most, they can

only be held to the extent of the injury caused by the fire alone. If the fire preceded the explosion and the explosion was an incident thereto, the fire was the direct or proximate cause of the injury by the explosion, and plaintiff was entitled to recover for his entire loss. But, if the explosion preceded the fire and was not caused by it, plaintiff can, under the express terms of the policy, only recover for that proportion of the damages resulting from the fire alone. This construction is well established. There seems to be no serious conflict of authority in relation thereto. *Waters v. Merchants' L. I. Co.* 11 Pet. (U. S.) 225, 9 L. Ed. 691; 2 May on Insurance, 413; 3 Joyce on Insurance §2593; *Ostrander on Fire Ins.* §325; *Washburn v. Artisans' Ins. Co.* Fed. Cas. No. 17,212. But obviously the precedence of the explosion or of the fire is a question of fact. It depends upon and can only be determined by the evidence. And we must pursue this inquiry by reference to that portion of the record.

The rule as to the burden of proof on this subject may be
376 stated as follows: When the assured has shown the execution of the contract, also the loss together with the amount thereof, and notice to the insurer, the burden is on the insurer to prove that the loss or a part thereof is within one of the exceptions stated in the policy. It is hardly necessary to cite authorities upon this proposition. It is strictly in harmony with recognized rules for the construction of contracts, and defendants do not controvert it in their brief. Suit being brought upon the contract, it is for the insurer, who resists the recovery, to plead the exception upon which he relies and to sustain the plea by appropriate proofs. It follows that in the cases at bar the burden was on defendants to avert and prove that the loss or some portion thereof was within the foregoing exception. That is to say, the burden was upon defendants to show that the explosion preceded the fire, and that some portion of the loss sued for was occasioned by the explosion, and not by the fire.

There is no evidence in the case tending to show that a fire existed on the premises prior to the explosion. An inference may, perhaps, be drawn that something ignited the gasoline vapor and caused the explosion; but as to precisely what was such igniting agency does not appear. It was 9:30 p. m. in July. There was no fire in the stoves for heating purposes. There were some electric lights, but no actual combustion appeared to be taking place, save that arising from the use of illuminating lamps. On the other hand, all the testimony on the subject is to the effect that the fire was first seen after the explosion, and tends to show that it was caused by the explosion. Carlson, who was a salesman attending to his duties in the store, had the best opportunity of any witness called to know the fact in this regard. He was standing in the middle of the room and in full view of the rear portion thereof, where the fire was first discovered. He noticed no smoke or odor such as would be produced by a living or smouldering flame or by escaping gas. He says: "I don't think there was any fire in the building before the explosion occurred." Again: "There was no fire in there to my knowledge of any kind. The first thing I knew of the accident was the explosion." And, again, "I got
377 out of the building before the fire occurred." Yet he had

from 35 to 50 feet to go before reaching the sidewalk. Carlson is corroborated in this particular by the other two witnesses who testified on the subject. Neither of them was in the store, but they both heard the explosion; and both rushed into the street as quickly as possible thereafter. At first the building appeared to be dark, as the lights had been extinguished; but a few seconds afterwards the fire blazed up at the rear end of the storeroom. Fire is often the result of gasoline explosions. It usually follows quickly after the explosion; and this is especially true where inflammable materials like goods in a clothing store surround the exploding vapors. If any testimony had been received tending to show that a fire preceded and caused the explosion, thus creating a conflict of evidence upon this subject, we would probably regard the decision of the trial court as controlling. But, under the circumstances, we must conclude, that he adopted an erroneous view of the law, or misconceived the effect of the evidence. Governed by this evidence, as, of course, we must be, we can come to no other conclusion but that the explosion produced the fire, and was not itself a mere incident to or result of a preceding fire.

In this connection, a further consideration must be borne in mind. The "fire" referred to in the provision of the policies under consideration is an actual fire according to the ordinary and common use of the terms. The blaze produced by lighting a match, gas jet, or lamp is not alone such a fire as is contemplated; and the accidental igniting of gas by such means, resulting in an explosion, does not, within the language of the contract, render the explosion an incident to a fire. In *Mitchell v. Potomac Ins. Co.* 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74, it appeared that employes were in the habit of lighting a match when searching for articles in a certain portion of the basement. The evidence showed, or tended strongly to show, that the explosion was caused by the blaze from such a lighted match coming in contact with gasoline fumes. The identical question now under consideration was raised in that case under a similar provision in the policy. The court at

378 the trial, among other instructions, gave the following: "(2)

If an explosion occurred from contact of escaping vapor with a match lighted and held by an employe of the plaintiff, and the loss resulted solely from such explosion, the verdict must be for the defendant. (3) A match lighted and held by an employe of the plaintiff coming in contact with vapor and causing an explosion is not to be considered as fire within the meaning of the policy." These instructions were upheld by the court. That learned tribunal, at page 52 of 183, U. S. page 25 of 22 Sup. Ct. (46 L. Ed. 74), says: "We think each instruction was correct. A loss occurring solely from an explosion not resulting from a preceding fire is covered by the exception in the policy. And an explosion which occurred from contact of escaping vapor with a lighted match, under the facts stated, would also plainly come within the exception of the policy. Also a lighted match is not 'fire' when used as stated in the above third clause of the charge."

Further sustaining the construction that, in order to be within the meaning of the contract, the ignition of the explosive substance must be caused by an actual combustion involuntarily or illegally started, termed by some of the authorities a "negligent or unlawful" fire, and not by a harmless combustion, such as a lighted cigar, the burning of gas jets, the lighting of matches, reasonable fire in a stove for heating purposes, and other "innocent" fires, see the following additional authorities: Ostrander on Fire Ins. (2d. Ed.) §325; May on Ins. (4th Ed.) §416a United Fire Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735; Renshaw v. Fireman's Ins. Co. 33 Mo. App. 401; Briggs v. Insurance Co. 53 N. Y. 449; Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403.

Defendants then having shown that in this instance the explosion preceded and caused the fire, it became necessary to determine what proportion of the resulting injury was produced by such fire; for, as we have seen, by the terms of the contract, compensation can be recovered only for the damages thus caused. And upon this issue,

viz., discriminating between the damages caused by the explosion and those caused by the fire and showing the extent of loss resulting from the fire, the burden devolved upon plaintiff. That is to say, defendants having shown that the explosion occurred first in point of time, the burden shifts to the plaintiff, and it becomes his duty to prove the extent of the damages suffered from the subsequent and resulting fire. "When policy in terms assumes damage by lightning, but excludes that caused by cyclone or wind or tornado, the burden rests upon the assured to show just what damage was caused by the lightning, exclusive of the wind. Both claim and recovery must be confined to the actual direct damage caused by the lightning." Clement on Fire Ins. 126, rule 8, and cases cited. "The testimony seems to show some injury by lightning, and they claim damage was also caused by wind. In order to recover under the terms of the policy, it was incumbent upon the plaintiff to distinguish the two elements of damage. For that resulting from the lightning he had a right to recover; but for that which was caused by the wind there was no liability whatever upon the part of defendant." Warmcastle v. Insurance Com. 201 Pa. 304, 50 Atl. 941. In Beakes v. Phoenix Ins. Co. 143 N. Y. 402, 38 N. E. 453, 26 L. R. A. 267, defendant requested the court to charge the jury: "That if lightning struck the building and did some damage, and the wind came on and did the main damage, the jury must strictly confine their verdict to the actual damage done by lightning, but cannot give a verdict for damage done by wind." The Supreme Court of New York declares that the refusal to give this instruction was error, and at page 407 of 143 N. Y. page 454 of 38 N. E. (26 L. R. A. 267) says: "The lightning clause of the policy already quoted is very carefully worded, and limits the liability of the company to direct loss caused by lightning, and expressly excludes damage by cyclone, tornado, or wind storm. It must be admitted that the duty of a jury in

cases of this character is difficult to perform. If a building is shattered by a lightning stroke, but not prostrated and a moment later a high wind completes the work of destruction, it is not by any

means an easy task for counsel to prove the plaintiff's case
380 or for the jury to determine the amount of recovery and apportion the loss between lightning and wind. Courts are required, however, to enforce contracts as drawn by the parties, and under this lightning clause in the standard policy juries must be required to limit the recovery of plaintiffs to the direct loss or damage caused by lightning." Of course, it is not necessary for us to consider the fact that in the cases last above referred to the clause of the policy under consideration allows a recovery for damage done by lightning, but prohibits the same for damage done by wind; whereas, the clause of the policies sued on in the cases at bar makes the insurer liable for damage done by fire, but excludes liability for that resulting from explosion, unless the explosion, results from a fire. Obviously the construction in this particular applied in one class of cases is equally applicable to the other class of cases. The witnesses in these cases succeeded in making this discrimination; but their testimony as to the extent of the damages resulting from the fire is conflicting. And, as the trial failed to resolve this conflict, wrongfully adjudging the entire loss against defendants, we must reverse the judgment and remand the cause for a new trial.

Reversed.

Steele, C. J., and Maxwell, J. concurring.

(Court of Appeals of Colorado, April 26, 1897.)

STRAUSS et al.
v.
PHENIX INS. CO.

Insurance—Action on Policy—Evidence—Instructions—Condition of Policy Construed.

1. A report made by an insurance agent to his company is not admissible to corroborate his testimony that he had no knowledge at the time of the issuance of a policy of the existence of another policy covering the same property.
2. Where a policy of insurance was issued without a written application and on a personal inspection of the property by the agent, an instruction that any misstatements or an overvaluation of the property by the insured would avoid the policy is inapplicable to the facts, and misleading.
3. Where an issue in an action on a policy was as to whether the agent, when he issued the policy, had knowledge of an

outstanding policy covering the same property, and the jury were correctly instructed that, if the agent had such knowledge, it was the knowledge of the company, and was a waiver of a condition of the policy that it should be void if such other insurance existed, unless consent thereto was indorsed, on the policy, another instruction that, under the policy, the agent had no power to waive such condition except in writing indorsed on the policy, was misleading, as applied to the facts of the case.

4. A condition stamped on the face of an insurance policy when it is delivered, limiting the liability of the company to three-fourths the value of the property insured, or its prorata proportion of the three-fourths in case of other insurance, and further providing that "total insurance permitted is hereby limited to three-fourths of the *case* value of the property herein described, and to be concurrent herewith," is a consent that the insured may carry concurrent insurance within the limit named.

Appeal from District Court, La Plata County.

Action by S. Strauss & Co., against the Phenix Insurance Company to recover for a loss under an insurance policy issued to shields & Bunger, who were judgment debtors of plaintiffs. Judgment for defendant, and plaintiff-appeal. Reversed.

F. C. Perkins and Rogers, Cuthbert & Ellis, for appellants. Ritter & Russell, for appellee.

382 BISSELL, J.:

Shields & Bunger were indebted to Strauss & Co. for goods sold and delivered, and the vendors brought suit in the county court of La Plata county to collect their claim. It was put into judgment, and, by the proceedings which we are asked to review, Strauss & Co., sought to compel the appellee, the Phenix Insurance Company, to pay a loss covered by a policy which the insurance company had issued. The general facts out of which the liability is said to arise are not disputed. The judgment is not assailed, and the right of Strauss & Co. to enforce their claim against the insurance company is only contested on the general basis of the nonliability of the company for the loss. The policy was issued on the stock owned by Shields & Bunger; there was a fire; the goods were destroyed; and the only two matters litigated are the value of the goods, and the liability of the company under their agreement of insurance. There was evidence given by both parties respecting the amount of the stock and its value, and, as is usual in such cases, there was a wide discrepancy between the opinions of the witnesses. The opinion will not turn on this question, and we shall not express our views about it, because this is a matter for the jury to determine on the subsequent trial. The insurance company disputed their liability

mainly on the ground of a breach of the condition against other insurance, and, to settle the question presented, it is necessary to state what was done at the time the policy was procured. It was issued on the 22d of May, 1894, through the agent of the company, Gallotti, and was in the usual form of such policies. It provided generally against false representations, and that, if the surety had made or should make any other contract of insurance without written notice to and the consent of the company indorsed thereon, then the policy was to be void. It was further stipulated that no agent of the company should have the power to waive or modify these provisions. There was another stipulation, which is of very considerable significance in the interpretation of the contract. Its substance will be stated in so far as it is deemed important. There was stamped in red

383 on the face of the policy a condition which recited that it was a part of the consideration and *and* basis of the rate of premium that the company should not be liable in an amount greater than three-fourths of the cash value of the property described, or its pro rata proportion of the three-fourths in case of other insurance. This clause followed: "Total insurance permitted is hereby limited to three-fourths of the cash value of the property herein described, and to be concurrent herewith." This condition was stamped on the policy prior to its issuance by the agent, and when it was delivered to the insured. When the policy was taken out, the property was visited and examined by the agent, the amount of insurance discussed, and the agent declined to issue the policy for the amount desired, and limited it to the sum of \$800 on the stock of goods, and \$50 on the show case and store furniture and fixtures. At this time there was a policy already in force on the same property issued by another company. It was a matter of dispute whether the agent was informed of this policy when he issued the one in suit. The insured testified that the agent was told of it, and discussed it. This the agent strenuously denied. This was a matter for the jury to determine, and if their general verdict, which may perhaps be taken to include the determination of this question had been rendered under instructions which left it fairly open for their consideration, we should be bound to affirm the judgment because sustained by the finding. All the substantial difficulties in the case proceeded from instructions which the court gave, and those which were refused. It is quite impossible, within the limits of an ordinary opinion, to give them in detail, and we can only state generally wherein we disagree with the trial court, and the particulars in respect to which we think it erred in stating the law of the case. There are one or two minor errors which will be noticed, though possibly they are not of that gravity and importance which would compel us to reverse the judgment if we did not conclude the jury may have been misled, and rendered the verdict without due apprehension of the rules by which they ought to have been guided.

During the progress of the trial, the insurance company produced a copy of the report made by their agents of their daily business, in order to support the agents' contention that they were without 384 knowledge of the existence of other insurance when they issued the policy on behalf of the Phenix Company. The

report could have been offered for no other purpose, and could be of no value as evidence, save as it supported the agents' theory. The blank provided for a statement respecting other insurance, and, as it contained nothing on the subject, it possibly tended in a measure to support the agents' evidence to the point that the company was without knowledge of the other policy. Clearly, this memorandum was inadmissible. In the first place, it was not an original instrument. Neither was it a memorandum which could be offered in evidence to support the defendant's case. If it was available at all, it could only be referred to in order to refresh the recollection of the witness who was testifying about the matter contained in the memorandum, and of which he had no definite memory without a reference to it. There was no foundation laid for its use in this particular, and, as an original document, it was not an admissible piece of testimony. *Jones v. Henshall*, 3 Colo. App. 448, 34 Pac. 254; *Weaver v. Bromley*, 65 Mich. 212, 31 N. W. 839; *Carradine v. Hotchkiss*, 120 N. Y. 608; 24 N. E. 1020; *Baum v. Reay*, 96 Cal. 462, 29 Pac. 117, and 31 Pac. 561.

We now come to the instructions. There will be no attempt to review the whole charge, nor will reference be made to any parts of it save those which are deemed inaccurate as the case stood on the conclusion of the testimony. It is quite impossible to determine the effect of particular instructions, but it may be safely assumed that instructions which are inapplicable to the proof are liable to mislead the jury, and may have a prejudicial weight and force. Possibly, concerning these to which we intend now to refer, it might justly be said the error is not of a gravity sufficient to require reversal; but, since the judgment is to be set aside, we deem it best to refer to them, that the same difficulty may not reoccur.

The jury were told that the assured was required to state fairly and fully the facts in regard to the risk, and that any fraud or fraudulent concealment of such facts or overvaluation would 285 avoid the policy. Just how the jury construed this instruction, or what force and effect they gave to it, we cannot say. It was inapplicable to the condition of affairs presented by the evidence. There was no application in writing for the insurance. The agent came and inspected the property, and evidently determined the amount of risk he was willing to take. While this instruction states the true rule wherever there is a written application, it ought not to have been given where none was made. This instruction ought not to have been given, and, unless there is some change in the evidence, should not be repeated on the subsequent trial. *Philadelphia Tool Co. v. Brittish American Assr. Co.*, 132 Pa. St. 236, 19 Atl. *Knop v. Insurance Co.*, 101 Mich. 359, 59 N. W. 653; *Cross v. Insurance Co.*, 132 N. Y. 133, 30 N. E. 390.

The chief difficulty which the case presents springs from three instructions. If they were not on bases totally different, they were undoubtedly liable to misconstruction. The three instructions involved are numbers 2, 3, and 11. The eleventh instruction is not accurate as a statement of a legal proposition, but it is accurate as applied to the case made by the testimony. The third instruction

states the law correctly, and if it had been left to stand by itself, and was clearly unaffected by the eleventh, would have furnished a proper guide for the jury. It has been held by the supreme court that where there are two instructions in the case, one of which is a correct statement of the law, and the other inaccurate, the result is, of necessity, an error. *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771. Possibly that case only goes so far as to hold that, to produce this result, the conflicting instructions must be, the one accurate, and the other inaccurate. But even though one of them be accurate, and the other equally correct as a legal proposition, but inaccurate as applied to the case, and plainly liable to misconception by the jury, the same result must, of necessity, follow, and the rule remain that such a charge constitutes error. By the second and third instructions the jury were substantially told that if they should find, as a matter of fact, that, prior to the issuance of the policy or the

completion of the contract of insurance, the agent, and therefore the company, were fully advised as to the existence of other insurance on the property, it would be no defense for them on the present trial to show that another policy was outstanding, notwithstanding the condition contained in their own contract that the policy was to be void in case the party had or should procure other insurance. This seems to accord with the general rule prevailing in this country. *Knowles v. Insurance Co.*, 66 Hun. 220, 21 N. Y. Supp. 50; *Gristock v. Insurance Co.*, 87 Mich. 428, 49 N. W. 634; *Insurance Co. v. Lorenz*, 7 Ind. App. 266, 33 N. E. 444, and 34 N. E. 495; *Insurance Co. v. Norwood*, 16 C. C. A. 136, 69 Fed. 71; *Insurance Co. v. Hart*, 149 Ill. 513; 36 N. E. 990; *Renier v. Insurance Co.*, 74 Wis. 89, 42 N. W. 208; *Insurance Co. v. Lewis*, 30 Mich. 41; *Quigley v. Trust Co.*, 60 Minn. 275, 62 N. W. 287; *Gray v. Insurance Co.*, 84 Hun. 504, 32 N. Y. Supp. 424; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Wood v. Insurance Co.*, 149 N. Y. 382, 44 N. E. 80; *Robbins v. Insurance Co.*, 149 N. Y. 477, 44 N. E. 159.

Had these instructions with reference to the knowledge of the company been left undisturbed, the case would have presented very little difficulty. By the eleventh instruction, however, the jury were told that, by the terms of the contract of insurance which was submitted to them, no agent of the company had any power to waive or modify any of its provisions, unless the modification was written upon or attached to the policy. The jury were likewise told by the same instruction that this provision operated to prevent any waiver of any condition of the policy by any local agent, unless this waiver should be found indorsed on the policy itself. Manifestly, this statement was open to the construction that, although the agent might have known of the existence of the other insurance, yet in and of itself this knowledge would be inoperative to validate the policy, unless the agent had indorsed on the policy a waiver of the condition. Probably the court did not intend to so limit the instruction, but gave it as asked, on a general basis that it stated a correct rule of law, overlooking the fact that there was nothing in the case to which it could be applied. This is particularly emphasized by the fact that

387 the condition respecting other insurance stamped on the policy was the only indorsement affecting the right to take out other insurance, and, under the instruction which the court gave concerning it, the jury would conclude there had been no proper waiver, and the plaintiff could not recover. This is rendered evident by the twelfth instruction. The court interprets the indorsement to be simply a limitation on the total amount of insurance which might be taken, and rules that it does not abrogate the provision which made it incumbent on the insured to give written notice of other insurance, and secure the consent of the company thereto. It will thus be seen that the jury had before them three instructions on apparently contradictory hypothesis. First, they were told that if the agent had knowledge, that knowledge could be taken as a waiver of the condition. They were then informed that no agent had authority to waive the condition, and that any waiver must be indorsed on the policy. This was followed by a statement that the condition which was apparently indorsed to comply with the terms of the limitation prevented any other insurance, unless there was written notice of that insurance given the company, and an express consent therefor indorsed on the policy. These instructions, taken as a whole, do not express the true rules by which the rights of the parties are to be measured. In the next place, we do not regard the instruction respecting that condition in red as a correct interpretation of it. This, apparently, was an effort on the part of the agent to indorse a consent to other insurance in writing on the policy, as well as fix the limits of it. The limitation that the insurance should be restricted to three-fourths of the value of the property, limited the liability of the company to their proportionate share of the loss in case of other insurance, and in effect was the expression of a consent on the part of the company that the insured might carry insurance on the stock to the extent of three-fourths of its value. This is the natural and evident import of the provision. It is the only legitimate and grammatical construction of the past participle "permitted" and is the true construction of the language used.

388 The insured had a right so to construe it. It is to be so taken as against the company, because, where there are two possible constructions of a contract, all doubtful provisions of insurance policies must be construed most favorably to the insured. This is the general doctrine, and has been recognized by our supreme court. *Insurance Co. v. Horner*, 14 Colo. 391, 23 Pac. 788; *Insurance Co. v. Manning*, 3 Colo. 224.

There are some minor errors urged, which we deem it unnecessary to discuss. While, possibly, other instructions are open to criticism, and the court might well have given some which were asked, and modified others, they present no substantial difficulty, and constitute no grave error. If the matters already suggested are eliminated on the subsequent trial, the verdict which the jury may render will undoubtedly settle the rights of the parties, and conclude this controversy. For the reasons suggested, this case must be reversed, and remanded for another trial. Reversed.

Wilson, J., not sitting.

(Court of Appeals of Colorado, April 11, 1898.)

HELVETIA SWISS FIRE INS. CO.

v.

EDWARD P. ALLIS CO.

Foreign Corporations—Insurance—Interest—Ownership—Proof of Loss—Waiver—Pleading—Evidence—Instructions—Appeal.

1. Contracts of a foreign corporation doing business in Colorado are not invalidated, and its capacity to sue thereon is not affected, by failure to comply with Gen. St. Secs. 261, 262, requiring such a corporation to file a copy of its charter and of the law under which it was organized with the secretary of state, and providing that a failure to do so shall render the officers and stockholders individually liable on its contracts.
2. Under Code Sec. 49, providing that the complaint shall contain a statement of all the facts constituting the cause of action in ordinary and concise language, the conditions in a policy of insurance attached to a complaint cannot be consulted in determining whether a cause of action on the policy has been stated.
3. Where a cause of action on an insurance policy is stated, the company, relying on the breach of a condition of the policy, which is attached to the complaint, should set forth the condition and facts constituting the breach.
4. Assured testified that the question of title was never mentioned between him and the insurance company. The company's agent testified that assured, when applying for a previous policy, had referred to another as part owner, and later stated that the policy should have been issued to him; that he owned the entire property, and had to pay out all the money and was going to have the whole business. Held insufficient to show a fraudulent representation of sole ownership.
5. Where the evidence is not in conflict, the question as to whether there was a waiver of proof of loss under a policy is for the court.
6. Where the insurance company's adjuster took steps looking to an adjustment of the loss, went to the scene of the fire, examined the ruins, proposed arbitration to assured to ascertain the amount of loss, and sent a man to the scene to estimate the damages, after which he told assured that everything appeared to be satisfactory, waiver of proof of loss will be presumed.
7. The placing of the defence to an action on a policy of insurance on the ground that the policy was not in force when the property was destroyed amounts to a waiver of proof of loss.
8. Assured acquired an ownership in consideration of advancements of money for building and machinery and the payment of

debts. His right was disputed, and steps were taken to compel him to surrender it, but he was in possession claiming sole ownership, and no adverse claim had been successfully asserted against him and his title had not been judicially declared invalid. Held, that the jury was justified in finding that he had an insurable interest.

9. Though an instruction is not necessary, if it is harmless it is not ground of complaint.
10. In the absence of evidence indicating fraud, a refusal to instruct as to the method of proving fraud is proper.
11. Where the evidence fails to connect assured with the act of another in setting fire to the property, it is proper to refuse an instruction based on the connection of assured therewith.

Appeal from District Court, Arapahoe County.

Action by Edward P. Allis Company against the Helvetia Swiss Fire Insurance Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Osborn & Gibbs and Van Ness & Redman for appellant. R. D. Thompson and J. A. Deweese, for appellee.

THOMPSON, *P. J.:*

This is an action on a policy of insurance of a stamp mill and machinery against loss or damage by fire. The complaint averred that the plaintiff, the Edward P. Allis Company, was a corporation existing by virtue of the laws of the State of Wisconsin. It alleged the issuance of the policy by the defendant, the Helvetia Swiss Fire Insurance Company, to J. A. McIntyre; the payment by him of the premium; the destruction of the property insured, by fire; notice of loss to the defendant; compliance by McIntyre and his assignee, the plaintiff, with the terms and conditions of the policy, except the condition concerning proof of loss, compliance with which it was alleged was waived by the defendant; an insurable interest in the defendant in excess of all insurance on the property; the assignment of the contract of insurance by McIntyre to the plaintiff; and the failure of the defendant to pay the amount of insurance specified in the policy, or any part of such amount. Attached to the complaint was the policy sued on, to which the complaint referred as being a part of it. The answer denied the capacity of the plaintiff to maintain the action, because as a foreign corporation, it had not filed in the office of the secretary of state the certificates required by law, admitted the issuance of the policy as stated in the complaint, admitted the receipt of notice of the loss, admitted the assignment of the policy and denied that the terms and conditions of the policy had been complied with, or that the defendant had waived the production of proof of loss, or that the value of the property was greater than the insurance, or that at the time of the issuance of the policy or the loss McIntyre had an insurable interest in the property. Further the answer averred that at the time of the issuance of the policy Mc-

Intyre falsely and fraudulently concealed and misrepresented the facts concerning the ownership of the property by representing that he was its sole and unconditional owner whereas he was not its owner, and had no insurable interest or title in it; and alleged that any interest which he might have had in the property previous to or at the time of the issuance of the policy had been forfeited before the destruction of the property by fire; that if the defendant had been apprised of the facts as they were it would not have issued the policy that a gold stamp mill which was part of the property insured had been shut down for more than ten consecutive days next preceding the fire; that no proof of loss was made by McIntyre or the plaintiff as required by the conditions of the policy; nor was such proof waived by the defendant; and that in pursuance of a conspiracy between McIntyre and one Miller to cheat and defraud the defendant of the insurance money, and at the request and by the procurement of McIntyre, Miller wilfully and maliciously set fire to and destroyed the property. The replication denied the averments of the answer, and set forth the particular facts relied upon as constituting waiver of proof of loss. The trial resulted in a verdict and judgment for the plaintiff for the amount claimed, and the defendant appealed.

It is contended on behalf of the defendant that by reason of the failure of the plaintiff to comply with the statutory requirements concerning foreign corporations doing business in this state, it had no capacity to sue, and that it therefore cannot maintain this action. It appears from the evidence that McIntyre was indebted to the plaintiff for some mining machinery which it had sold to him, and that the policy was assigned to it to secure the indebtedness; and counsel further contend that therefore it was doing business in this state in contravention of the statute, and that the fact that its cause of action grew out of the business so done is an additional reason why this suit cannot be maintained. If the question which counsel seek to raise fairly arises upon the statute, it has been set at rest by a series of adjudications. Whether the transactions between McIntyre and the plaintiff amounted to a doing of business in this state within the prohibition of the statute, we are unable to judge from the evidence; but it is unnecessary to decide the question. The statute makes it the duty of every corporation organized outside of this state and doing business within it to file in the office of the secretary of state a copy of its charter or certificate of incorporation, and of the corporation law under which it was organized; and provides that a failure so to do shall render its officers, agents and stockholders jointly and severally liable on all its contracts made in this state during its default. Gen. Stat. Sects. 261, 262. There is no provision that the contracts of a corporation which has failed of compliance with the law shall be avoided; on the contrary, their validity is recognized and they are enforceable not only against it, but against its officers, agents and stockholders. Nor does the statute assume to deprive it of any remedy which it would otherwise have upon its contracts, or for the protection of its property rights. No consequence is attached to the failure except the subjecting of its officers,

393 agents and stockholders to a personal liability on its contract; and the courts cannot very well go further than the legislature has gone. We feel entirely safe in saying that there is nothing in the statute by which the plaintiff's capacity to sue, or its right to maintain its action to enforce its demands, is in any way affected. Utley, v. Mining Co., 4 Colo., 369; Tabor v. Mfg. Co., 11 Colo., 419, 18 Pac. 537; Kindel v. Lith. Co., 19 Colo. 310, 35 Pac. 538. The policy was filed with the complaint, and the complaint recited that the policy was part of it. Attached to the policy was a somewhat extensive list of conditions, among which was one that, if the interest of the insured was other than the unconditional and sole ownership, the policy should be void. In respect to this condition it is argued that, as a policy was made a part of the complaint, and as the complaint did not allege that the interest of McIntyre was an unconditional and sole ownership, but merely that the interest was an insurable interest, which might or might not be such ownership, a cause of action was not stated and the complaint was bad. The answer did not set forth the condition, or claim anything by reason of it. It did not seek to bring in question the nature of McIntyre's ownership, except in connection with an allegation that the defendant was induced to issue the policy by the false and fraudulent representations of McIntyre that he was the unconditional and sole owner. An issue upon this allegation would not involve the condition, or bring it into the case. If the policy with its condition, was a constituent part of the complaint, we are not disposed to controvert the proposition of counsel that an allegation of unconditional and sole ownership in McIntyre was necessary, and that the complaint was bad without it. But was the policy, or anything it contained, or anything attached to it, a part of the complaint, or could it be made so by any statement or recital in the complaint? Sec. 49 of the Code provides that the complaint shall contain among other things, a statement of the facts constituting the cause of action in ordinary and concise language, without unnecessary repetition. Therefore, whether a cause of action has been stated must be determined by an

394 inspection of the allegations found in the complaint itself, and not by an examination and construction of outside papers or documents, whether attached to the complaint or not. It was never intended that Courts should look into and interpret written instruments executed by parties to the suit or others, to discover what the pleader meant to allege. In Buck v. Fischer, 2 Colo., 182, before the adoption of the code it was held by the Supreme Court that the allegations of a bill in equity must show a case without regard to the exhibits, because they could not be taken as part of it; and in Brooks v. Paddock, 6 Colo. 636, it was said by the same court, after the code, that the averments of the complaint can alone be looked to in determining its sufficiency; that, if it is defective for want of material allegations, it cannot be aided by reference to exhibits made a part of it; and that it must state a cause of action without regard to the exhibit. See, also Curry v. Lackey, 35 Mo. 389, Marshal v. Hamilton, 41 Miss. 229; Oh Chow v. Hallett, 2 Sawy. 250; Fed. case No. 10469; Penrose v. Ins. Co. 66 Fed. 253. A good

cause of action appeared on the face of this complaint, and, if the defendant intended to rely on a breach of any condition of the policy, the condition and the facts constituting its breach should have been set forth in the answer.

The next question presented relates to the representations alleged to have been made by McIntyre to the defendant's agent that he was the sole and unconditional owner of the property. If McIntyre represented that he was the sole and unconditional owner of the property, and if the policy was issued in reliance on the representation, and if the representation was false, the plaintiff was not entitled to a recovery. If there was such a representation, we ought to be able to find it, or some trace of it, in the evidence. Mr. McIntyre testified that Mr. Driscoll, the defendant's agent, solicited the risk with a considerable degree of persistency, but that the only question he ever asked concerning the mill was where it was located, and that the subject of title was never mentioned or alluded to. The only other witness to the transaction was Mr. Driscoll, the man to whom the representation was made, if it was made at all; and we are unable to find in his testimony any statement of McIntyre that he was the sole and unconditional owner of the property or any equivalent statement. His testimony concerning what was said

about the title, prefaced by a short narrative which he gave of events leading up to it, was briefly as follows: Previous to writing the policy in suit, a Mr. Morgan asked Mr. Driscoll to write insurance on this same stamp mill, directing him to see Mr. McIntyre, who was interested with him (Morgan) in the property, in relation to the matter. Mr. Driscoll called on McIntyre, who ordered him to write \$1,000 on the building, and \$500 on the machinery, and directed the insurance to be written in the name of McIntyre and Co., saying that Morgan was a partner of his, and interested with him. This insurance was written in the Atlas Insurance Company, of which Driscoll was the agent. Afterwards McIntyre applied to him for \$2,000 additional insurance on the property, to be written in his own name, saying that the first policy should also have been so written. The first policy was then assigned by McIntyre, for McIntyre and Co., to McIntyre personally, the insurance company indorsing on the policy its consent to the transfer. When the additional \$2,000 of insurance was written, McIntyre said that "he owned the entire property, mines and all; that he had got tired of fooling around with other people; that he had to pay all the money out, and everything of that kind, and was going to have the whole business." Respecting this testimony there are two observations to be made: First, the answer charges that McIntyre falsely and fraudulently concealed and misrepresented the facts concerning the title by representing that he was the sole and unconditional owner of the property. It is a representation and not a warranty, that is averred; and the representation is alleged to have been made fraudulently. To sustain the allegation, it must appear not only that McIntyre represented himself as the sole and unconditional owner but that the representation was false, and that he made it with knowledge of its falsity, with the intent to deceive the defendant. Now, the statement of McIntyre was

not that he was the sole and unconditional owner, or that there was no outside party claiming an interest in the property; and it is evident from his language that he was not endeavoring to convey the impression that he had an absolute title. He had previously informed Mr. Driscoll that Mr. Morgan was interested with him, and that he did not now claim that he had received any transfer of Morgan's interest. He based his right to the property solely on the ground that he had been compelled to advance all the money in connection with it; and it seems clear from what he said that his notion was that what he had paid for ought to belong to him. He did not profess to give facts but only conclusions which he had worked out as to his rights; what he meant by saying that he was the owner was fully explained by his subsequent language, and no person of ordinary business intelligence would understand his statement to mean that he had a complete or indefeasible title. Second, the statement of Mr. McIntyre to which Mr. Driscoll testified, was made, if at all, when the additional \$2,000 of insurance was written. The policy in suit is for \$1,000. We are unable to find anything in the record to connect this policy with the insurance for \$2,000, or to indicate that the defendant, in issuing this policy was influenced by the statement testified to, or any other statement. In our opinion, the allegation concerning false representation was wholly unsupported by the evidence.

Another condition of the policy was that, if a fire should occur, the insured should give immediate notice of the loss in writing to the insurance company, and within sixty days after the fire render a statement to the company, signed and sworn to by him, as — the time and origin of the fire, the interest of the insured and all others in the property, the amount of the loss, and some other matters of fact affecting the liability of the insurer. A day or two after the fire, McIntyre notified Mr. McGrew, defendant's general agent, of the loss. No objection is taken either to the manner or form of the notice, and there is no question concerning it in the case. The sworn statement was never rendered. The complaint admitted this, but alleged facts of waiver. The answer denied waiver, and we must resort to the evidence to see what it disclosed in relation to the question. The facts are not in dispute. The testimony of Mr. McIntyre and Mr. McGrew was all the evidence there was on the subject, and there was no disagreement between the witnesses. McGrew was the general

397 agent of the defendant, and an adjuster of losses for it.

Shortly after receiving the notice, he took steps looking to an adjustment of this loss. He went to the scene of the fire, taking a Mr. Grant with him, and the two examined the ruins, and came back to Denver. He then proposed to McIntyre that they each select a man, the two chosen, if necessary, to select a third, and that the men so selected should view the property, and conclude as to the damage that had been sustained. McIntyre did not assent to the proposition. McGrew then, with the consent of McIntyre, sent a Mr. Cole, who had something to do with the building of the mill and the placing of the machinery, to the scene of the fire, to examine the mill and machinery, and make figures as to what the amount of the damage

was. Mr. Cole went and made an examination lasting several days. He returned, and furnished a written report to Mr. McGrew of the condition of the property, together with an estimate of the cost of restoring the mill and machinery to a condition as good as they were in before the fire. After receiving Mr. Cole's report, McGrew told McIntyre that everything appeared to be satisfactory. This all occurred before the expiration of the 60 days within which proof of loss might be made. During all this time McGrew was in frequent conversation and negotiation with McIntyre in respect to the loss and in its adjustment. He never suggested to McIntyre that the latter had failed to make the proof required by the condition in the policy, or called upon him for such proof, or suggested that the proof would be desirable. Apparently, he was undertaking to make an adjustment of the loss by means of a personal investigation of the facts, and by means of an examination which he caused to be made by another; and it is to be inferred from the method he pursued that he did not regard formal proof as necessary, or believe that it would be of any assistance to him. So far as this record discloses, the objection of want of proof of loss was made for the first time in the defendant's answer. The evidence being free from conflict, there was

no question of fact for the jury to decide; and the question
398 whether the production of the sworn statement was waived is
one of law. *Towle v. Insurance Co.*, 91 Mich. 219, 51 N. W.
987. Any person may preclude himself from insisting on a formal
condition inserted for his benefit in a contract. And it is not neces-
sary that the waiver should be express. It may be a legitimate de-
duction from his acts. Upon the question what acts of an insurance
company or its agents will be evidence of waiver of performance of
a condition annexed to a policy of insurance, there has been consid-
erable adjudication; and the question has usually arisen, as it arises
here, upon the neglect or failure of the insured to comply with the
condition concerning proof of loss. While the facts in no two cases
are precisely similar, the general principle to be extracted from the
decisions is that the waiver may be inferred either from acts of the
insurers which evidence a recognition of their liability, or from their
denial of liability exclusively for other reasons. *Association v. Mat-
thews*, 65 Miss. 301, 4 South. 62; *Snowden v. Insurance Co.* 122 Pa.
St. 502, 16 Atl. 22; *Phillips v. Insurance Co.*, 14 Mo. 220; *Boyd v.
Insurance Co.*, 70 Iowa, 325, 30 N. W. 585; *Insurance Co. v. Dierks*,
43 Neb. 473, 61 N. W. 740; *Insurance Co. v. Gracey*, 15 Collo. 70,
24 Pac. 577; *Fland Ins.* 541. Mr. McGrew's authority in the premises
is unquestioned, and we think that his conduct with reference
to the subject-matter of the loss will bear but one interpretation, and
that is that formal proof of loss in accordance with the condition was
intended to be dispensed with. Before the expiration of the time
within which the proof was required, he took steps towards an adjust-
ment of the loss and, after having viewed the property himself in
connection with a person whom he took with him for the purpose, he
proposed to Mr. McIntyre that the question of the amount of loss
sustained should be submitted to arbitrators. The question to be
submitted was not whether the defendant was liable at all, but what

the true amount was which it should be required to pay. Upon the declination by Mr. -Intyre of this proposition, Mr. McGrew, with the concurrence of Mr. McIntyre, sent Mr. Cole to the scene of the fire, to make an examination, return a report of the condition of the property, and prepare an estimate of the amount of the damage.

399 After Mr. Cole had concluded the examination and made the report, Mr. McGrew informed Mr. McIntyre that everything appeared to be satisfactory. He never indicated that any proof of loss by McIntyre was desired, but proceeded on a knowledge of the loss which he already possessed, and upon his own independent responsibility, to ascertain the extent of the damage done. Mr. McGrew's conduct would naturally, and we think necessarily, produce the impression that proof of loss by McIntyre was not required. If McGrew was proceeding in good faith, and intended to settle the claim, the measures which he took to ascertain its amount rendered other proof unnecessary. If he was not proceeding in good faith, then his conduct was misleading, and, we must presume, was intended to mislead. In view of the facts as they appear in evidence, we do not think the defendant can be heard to say that proof of loss was not made.

But the defendant, in its answer, denied its liability on grounds entirely different from that of failure to make proof of loss. If the statements in its answer were true, McIntyre's entire claim was founded on falsehood and fraud, and it would have been entirely immaterial whether proof of loss was furnished or not; in no event was he entitled to a recovery. The placing of its defense on the ground that when the property was destroyed the policy was not in force was in itself a waiver of the condition requiring proof of the loss by the insurer. In *Insurance Co. v. Dierks*, supra, the court said: "We do not mean to say, nor do we decide, that if a person insured shall neglect or refuse to give notice of a loss to the company in accordance with the requirements of the policy that the insurance company can never urge the failure of the insured to give it notice of the loss, or his failure to furnish proofs of loss as a defense to a suit upon the policy; but what we do decide is that when an insurance company is sued for a loss on a policy issued by it, and places its defense to such suit on the ground that by reason of some act of the insured the policy was not in force at the date of the loss, that then, in such action, all issues made by the pleadings as to whether the insured gave notice of the loss, and

400 whether he furnished the insurance company proofs of the loss, become immaterial." The defendant having waived

the condition that the interest of the insured must be the unconditional and sole ownership by not pleading it, and the issuance of the policy not having been induced by representations of any specified kind of title, if McIntyre had what is called an "insurable interest" in the property, he had a sufficient title to support the contract of insurance. An insurable interest does not depend upon the completeness or validity of the title by which the property is held. A limited or qualified interest is enough. Pos-

session under a contract of sale, even if the conditions of the contract have been violated, so that, if the breach be insisted upon, the contract cannot be enforced, is an insurable interest; and so is a title which is voidable, but not void. A leasehold interest is insurable. A stockholder in an incorporated company has an insurable interest in the corporate property; and, generally, if one has such an interest in the property that, in case of its destruction, he will suffer a loss, he has an insurable interest; and he may describe the property as his, and himself as the owner. *Gilman v. Insurance Co.* 81 Me. 488, 17 Atl. 544; *Warren v. Insurance Co.*, 31 Iowa, 464; *Seaman v. Insurance Co.*, 18 Fed. 250; *Niblo v. Insurance Co.*, 1 Sandf. 551; *Insurance Co. v. Woodruff*, 26 N. J. Law, 541; *Insurance Co. v. Chase*, 5 Wall. 509; *Wich v. Insurance Co.*, 2 Colo. App. 484, 31 Pac. 389, I may Ins. sections 87, 87a; *Fland Ins.* 342, 380. The question whether McIntyre had an insurable interest in the stamp mill and machinery was submitted to the jury by proper instructions, and the jury found that he had. If the verdict was justified by any substantial proof, it cannot be interfered with. The defendant introduced a voluminous mass of evidence, showing a variety of transactions in relation to the property, the outcome of which, it is contended, was that the interest which McIntyre had had in the property had been terminated. To review all the evidence would consume time and occupy space to no useful purpose. There was evidence that McIntyre acquired an ownership in the property by agreement with the parties who projected the enterprise in consideration of advances of money made by him for the building and machinery and the payment of the debts of the concern; and it tended to show that he became the sole owner at least of the machinery. It was also in evidence that his right to the mill building was disputed, and that steps were taken to compel him to surrender it. But it further appeared that he was in possession, claiming sole ownership, and it did not appear that any adverse claim was ever successfully asserted against him, or was ever recognized by him as having a valid existence, or that the question of his title in either mill or machinery had ever been judicially determined against him. Upon the evidence the jury might well find that he had an insurable interest in the property within every definition of the term. Upon his own testimony his interest was such that, even if he had stated to Driscoll, without qualification, that he was the owner, the statement would not have been, in law, a misrepresentation. The case went to the jury upon the evidence given, and their verdict is conclusive of the facts.

The objections to instructions are, for the most part, covered by what has already been said. A few observations will dispose of the remainder. It appears that one N. K. Miller at one time laid claim to the ground on which the mill was constructed by virtue of a certificate of location to which his name was subscribed, and which had been recorded in the office of the recorder of deeds.

The evidence showed that some years prior to the date of this certificate one Edward J. Stephenson had located a placer claim which included the same ground, and had duly recorded his location certificate. Subsequently a lease for 99 years of the ground constituting the mill site was executed by Mr. Stephenson and another, and there was evidence tending to show that Mr. McIntyre was the owner of that lease. Afterwards Mr. McIntyre and Mr. Miller entered into an agreement whereby the former made a lease of the property to the latter. During the trial, counsel for the defendant were insisting that Miller was the owner of the property or at least of an interest in it. We deem this preliminary explanation necessary to an understanding of what the court had in mind when it

402 gave the following instruction: "If you believe from the evidence that Nick K. Miller, about October 13, A. D. 1894,

took a certain lease of that date, introduced in evidence in this case, from said McIntyre, of the said mill insured by the policy sued upon in this action, in which he (Miller) acknowledged that McIntyre owned the said mill, then the court instructs you that the acceptance of said lease by said Miller raised a very strong presumption that said Miller had, prior to said October 12, 1894, relinquished to said McIntyre all interest that he ever had in said mill, and that said Miller recognized the ownership of the said McIntyre in the said mill; and unless you believe from other evidence in this case that presumption has been clearly overcome and explained, you will find that at the time of the said loss of the mill by fire said Miller had no interest therein." This instruction is the subject of vigorous attack, but, when closely examined, it amounts to nothing more than a statement of the legal relation which a tenant sustains to his landlord. If Miller was McIntyre's tenant, he could not deny McIntyre's title; and, if Miller had formerly been interested in the property, his acceptance of the lease from McIntyre was evidence that his interest had passed to McIntyre. In view of the other evidence in the case, we do not think that the instruction was necessary, or that it could have done the plaintiff any good or the defendant any harm; but that it may have been superfluous, without more, is not a valid ground of complaint. The defendant requested instructions that fraud may be proved by circumstantial evidence, that parties guilty of fraudulent practices usually conceal their acts, and that, therefore, resort must be had to the facts and circumstances surrounding the transaction. Considered as an abstract proposition, the foregoing is sound, and accords, moreover, with the general current of experience; but, in order that it may be proper as an instruction, some fact or circumstance must be in evidence from which fraud might be legitimately inferred. We are unable to satisfy ourselves as to what particular conduct of the plaintiff these instructions were intended to apply, but we do not find in the record any fact or circumstance connected with the application for insurance, or with the loss,

403 which indicates fraud. The court was also asked to instruct that, if the jury should find from the evidence that

McIntyre caused, procured, or assented to the destruction of the property by fire, the verdict should be for the defendant. The defendant undertook to show that Miller was responsible for the fire. But, even if we could say that it was conclusively established that the destruction was wilfully caused by Miller, there was a fatal want of evidence that McIntyre was in any manner connected with, or cognizant of, his act. Instructions not based on evidence are liable to be misleading, if nothing worse. The giving of instructions in accordance with the foregoing requests would have had a tendency to create a suspicion in the minds of the jury that the court had detected something in the evidence from which it might be inferred that McIntyre was guilty of some fraudulent practice which would vitiate the insurance, or of connivance in the destruction of the property; and, in view of what the evidence actually was, would have been gross error. *Fisk v. Light Co.*, 3 Colo. App. 319, 33 Pac. 70. The other instructions asked were based on theories of the case with which we have already disagreed, and, in our opinion, were properly refused. We have not given separate discussion to each of the numerous points made for the defendant, but they have all been considered, and have all been disposed of, in this opinion. We find nothing in the entire record to authorize a reversal, and we therefore order an affirmance of the judgment.

Affirmed.

HARTFORD FIRE INS. CO.

v.

SMITH et al.

1. Under the terms of an insurance policy where the insured were required to give immediate notice to the company in case of loss: Held that notice to the company's local agents on the day after the loss was sufficient.
2. Where appropriate words are employed descriptive of the present use of the insured premises, courts will not construe them into a promissory stipulation that the use of the premises shall remain unchanged, unless the intention of the parties to that effect is clearly manifest.
3. Where, under the terms of a policy of insurance, it was provided that "if the premises hereby insured shall become vacant or unoccupied, this policy shall be void," and one of the rooms continued to be occupied nightly as a sleeping apartment by a person engaged in the repair of the building; Held, that the building did not become vacant or unoccupied under the meaning of the policy.
4. There must be a substantial compliance with the terms of the policy in furnishing proofs of loss, unless waived by the insurer. Failure to furnish a copy of all policies covering the insured premises, when the same is required in the pre-

- liminary proof, by the terms of the policy, is not a substantial compliance in this particular.
5. If the company put the refusal to pay upon other grounds than of defective proofs, it will be held a complete waiver of the preliminary proofs.
 6. An agent having special authority to adjust a particular loss cannot, by virtue thereof, adjust a different loss, and whatever he may do with reference to the different loss cannot affect the principal. To bind the principal, it must be shown by competent evidence that the agent acted within the scope of his authority.
 7. When incompetent evidence is permitted to go to the jury, and that may have influenced their verdict, the verdict will be set aside. Whenever it appears that there is written evidence of a particular fact, oral evidence must be excluded, or the non-production of the written evidence legally excused.

Error to Probate Court of Arapahoe County.

This was an action of assumpsit brought by Smith and another, the defendants in error, against the plaintiff in error, upon a policy of insurance against loss by fire. The jury rendered a verdict in favor of the plaintiffs below, and judgment was entered on the verdict. The facts are sufficiently stated in the opinion.

Messrs. Sayre, Wright & Butler, for plaintiff in error.

Mr. C. S. Thomas, and Mr. T. M. Patterson, for defendants in error.

405 THATCHER, C. J.:

By the terms of the policy the assured were required, in case of loss, to give immediate notice thereof to the company. On the day after the fire, Kassler & Patterson, local agents of the company, whose duty it was, in the event of loss, to notify their principal, wrote a letter to G. F. Bissell, general agent of the company at Chicago, apprising him of the loss. On the same day, and after the letter was written, the assured notified Kassler & Patterson of the loss, and were informed by them that it was already known to them, and that they had signified the same by letter to the company. Was this notice of loss given to the local agents sufficient? It has been held that where the policy requires the notice to be given to a particular officer or agent of the company, that notice to any other officer or agent than the one designated would not be a substantial compliance with the provisions of the policy, and that it would, therefore, be insufficient. But the policy under consideration contains no such restrictions. The assured are, therefore, free to give the company notice in any manner they choose. The only requirement is that the company be apprised of the loss immediately after it occurred. The notice given to the agents must, under a proper construction of

the assured's contract, be held to be a notice to the company. *Kil-lips v. The Putnam Fire Insurance Co.* 28 Wis. 480.

The fact that the occupancy of the building insured was changed after the issuance of the policy is not deemed to be material. The statement in the policy that the insured building was "occupied by the tenant for a boarding-house," was but an affirmation of its then existing condition, not promissory in its character.

It is not to be regarded as a warranty that the building would continue to be occupied in the same way. If a continuing warranty had been intended, it is to be supposed it would have been expressed in more apt language. Where appropriate words are employed, descriptive of the present use of insured premises, courts will not construe them into a promissory stipulation that the use of the premises shall remain unchanged, unless the intention of the parties to that effect is clearly manifest. *Blood v. Howard, Fire Ins. Co.*, 12 Cush. 472; *Smith v. Mechanics & Traders Ins. Co.*, 32 N. Y. 399; *Hough v. City Fire Ins. Co.* 29 Conn. 10.

406 It is provided in the policy that "if the premises hereby insured shall become vacant or unoccupied * * * this policy shall be void." Were the premises vacant or unoccupied within the meaning of the policy at the time of the fire? The building was no longer used as a boarding house, but as we have seen, the insured were under no obligation to continue its use for that purpose. When the boarding-house tenant vacated the building, Mr. Feely at once occupied it, and continued its occupation until it was burned down. He was engaged in repairing the building, and slept therein every night. One of the rooms was furnished, and used by him as a sleeping apartment. The fact that he took his meals elsewhere does not, in our opinion, operate to defeat the policy. We do not think that the company, by requiring that the building should be occupied, stipulated for a higher degree of care and watchfulness than the occupancy by Mr. Feely implies. While we shall endeavor to guard the rights of insurance companies by a fair and reasonable construction of their contracts, we cannot consent to see frittered away the rights of the insured by an illiberal and unjust interpretation of a policy designed for their (the insured) protection. We are of opinion that the building did not become vacant or unoccupied within the meaning of the policy. In this view one of the objections of the general manager to the preliminary proof, viz: that the insured failed to set forth the occupancy of the building, is not valid. The statement "that the building insured and destroyed was occupied by Patrick Feely as a lodging house" is sufficient.

As a precedent condition to the right of the assured to recover from the company, a particular account of the loss in the nature of preliminary proofs is required. The character of this particular account is determined by the policy. Among other things the assured are required in their preliminary proofs to furnish a copy of all policies covering the insured premises, in which respect they 407 failed. That there must be a substantial compliance with the terms of the policy in furnishing the preliminary proofs before the assured are entitled to any indemnity in case of loss, the

authorities are agreed, unless the company waive the defects in the proofs, or waive the proofs altogether, by putting the refusal to pay on other grounds. *Blake v. Exchange Mutual Ins. Co.*, 12 Gray, 270; *Franklin Fire Ins. Co. v. Coats & Glenn*, 14 Md. 293; *Charleston Ins. & Trust Co. v. Neve*, 2 McMullen (S. C.) 237; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Tayloe v. Merchants' Ins. Co.* 9 How. (U. S.) 390; *Hartford Pro. Ins. Co. v. Harmer*, 2 Ohio St. 452; *Noyes v. Washington County Ins. Co.* 30 Vt. 659; *Peoria Marine & Fire Ins. Co. v. Whitehill*, 25 Ill. 470; *Vos v. Robinson*, 9 Johns. 192; *Commonwealth Ins. Co. v. Sennett et al.*, 41 Penn. 162.

These authorities abundantly attest that by the acts of the underwriters there may be a complete waiver of the preliminary proofs. Was there a waiver in this case? The general manager of the company at Chicago, after receipt of proof of loss from Smith & Doll, wrote them a letter informing them that the "alleged proof of loss was incomplete and unsatisfactory, and not in accordance with the conditions of the policy in the particular that a copy of the policy was not furnished with and made a part of the alleged proof of loss, and also that the occupancy of the building at the time of the destruction by fire is not set forth in the alleged proof of loss." Subsequently McLane visited Denver for the purpose of adjusting the losses of the company on the Rough and Ready mill, which had been destroyed by fire sometime before. Mr. Doll testified that McLane offered \$250 in satisfaction of the policy, and declared to him that "the only reason why he would not pay the full amount of the loss was, that the house was not rented at the time of the fire." No mention was made of any defects in the preliminary proofs. The refusal to pay was put distinctly upon other grounds than the failure to furnish the "particular account" in accordance with the provisions of the policy. McLane having thus denied liability of the company solely for other reasons than incomplete or defective proof, it must be held that the company waived the condition requiring proof before payment of loss, if McLane acted within the scope of his authority.

"Surely," says Mr. Justice Strong, speaking for the court in the case of *The Inland Insurance and Deposit Company v. Staffer*, 33 Penn. 403, "it cannot be contended that it was not competent for the insurers to waive performance of a formal condition, introduced solely for their own benefit. At most it was a condition precedent not to the undertaking of the insurers, but to the right of action of the insured. It is no new doctrine that insurers may waive objection to defective compliance with such a stipulation, or to entire non-compliance, and that such waiver in effect struck the condition out of the contract; nor need the waiver be express. It may be inferred from the acts of the insurers evidencing a recognition of liability, or even from their denial of obligation for other reasons."

Under the authorities there was a complete waiver of preliminary proofs, if McLane had power to bind the company.

But the scope of McLane's authority does not sufficiently appear. If it were established either that he was a general adjusting agent of the company, or that he was specially authorized to examine into and

adjust the loss of Smith & Doll, we should hold that by his acts the company was estopped from demanding further preliminary proofs. The witness Kassler's primary knowledge of the agency of McLane was based upon a letter he had received from the general manager at Chicago, from which he learned that McLane was "a representative and adjuster" of the company, and that he would be sent out to adjust the Rough and Ready mill loss. This evidence the company moved to exclude on the ground that it was secondary. This motion was not met with an offer to excuse the absence of the letter. The letter was, without question, the best evidence of its own contents, and the court erred in permitting secondary evidence to be substituted for it. As written evidence is higher than oral, whenever it appears, whether in the direct or cross-examination, that there is written evidence of the facts sought to be proved, the inferior evidence must be excluded altogether, or the non-production of
 409 the written evidence be legally excused. 1 Phillips' Ev. 470 (5th Am. Ed.).

The motion to exclude the secondary evidence should have been allowed.

It appears that McLane did, in fact, adjust the loss on the Rough and Ready mill, and that upon his adjustment it was paid. This shows a ratification of his acts in this particular matter. As the evidence tending to prove his original authority in the form in which it was introduced, was incompetent, and as the only act of McLane, which was subsequently ratified by the company, was his adjustment of the Rough and Ready mill loss, it would be going very far to say that the jury was warranted in finding as it must have done if the verdict is to stand, that the company had waived a strict compliance with the condition of the policy requiring preliminary proof, by reason of anything that had been said by McLane, to Smith & Doll. An agent having special authority to adjust a particular loss, cannot, by virtue thereof, adjust a different loss, and whatever he may have asserted with reference to that different loss cannot affect the company. As in our opinion, the secondary evidence not being considered, the cause must be remanded for a new trial, we forbear to comment further upon the testimony.

The inquiry as to the scope and extent of McLane's authority being one of fact was, as it should have been, submitted to the jury. Hough v. City Fire Ins. Co. 29 Conn. 10; Keenan v. Missouri State Mut. Ins. Co., 12 Iowa, 126.

But as there was incompetent evidence before it, that may have largely influenced its verdict, it cannot be permitted to stand.

The judgment of the court below is reversed with costs, and the cause remanded for further proceedings according to law.

Reversed.

410 2 Colo. App., 484.

WICH, Plaintiff in Error,

v.

THE EQUITABLE FIRE AND MARINE INS. CO., Defendant in Error.

1. Insurance—Change of Title.

The clause in a policy of insurance providing against a change — interest, title or possession of the property insured, is not violated by a change, not in the fact of title, but only in the evidence thereof. If the change is merely nominal and not of a nature calculated to increase the danger of loss, the policy is not violated.

2. Insurance—Incorrect Statements.

It is a good answer to a plea setting up as a breach of the condition of a policy that the interest and ownership of the assured in the property is incorrectly stated, to show that it was so stated by the mistake or wrongful act of the agent to whom the application was made, that he was fully advised as to the fact and was acting within the scope of his authority.

3. Burden of Proof.

When the insurer sets up want of title in the assured, the burden of proof devolves upon him of establishing, not only that the assured had not title to the property, but also that he had no insurable interest therein.

4. Policy—Prima Facie Evidence.

A policy issued to a person is prima facie evidence of his title to the premises, and, unless questioned, is conclusive.

5. Insurance—Ownership.

The purchaser of real estate by contract is the equitable owner, and, for the purpose of insurance, may be said to be vested with the entire, unconditional and sole ownership of the property.

6. Fraud—Burden of Proof—Presumption.

If fraud on the part of the assured is set up in avoidance of the policy, the insured must establish it by competent affirmative evidence, as it will be presumed that the assured acted honestly and in good faith.

Error to the District Court of Arapahoe County.

February 4, 1899, The Equitable Fire and Marine Insurance Company, defendant in error, made and delivered to John Wich, plaintiff in error, in the business name of the Arkansas Valley Brewing Company, its policy of insurance for the sum of \$1,530 upon certain buildings and personal property to run for the period of one year.

September 5, 1889, the buildings and their contents were destroyed by fire. Proof of loss was made and the company denied any liability under the policy. This action was brought to recover the sum mentioned.

411 The answer is general and specific. It denies that the busi-
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ness name of the plaintiff was The Arkansas Valley Brewing Company; that the property insured was the property of plaintiff at the time of the issuance of the policy or at the time of the loss. It admits that the policy was issued to The Arkansas Valley Brewing Company, but alleges it was procured by false and fraudulent representations in this, that Wich represented he was the sole owner of the premises when in fact neither he nor the Arkansas Valley Brewing Company were sole owners. It is further claimed that the value of the property was not as represented.

From the record we learn that at the time of the issuance of the policy the property stood in the name of Gottlieb Hess, Paul Voght, Harmon Ell and the plaintiff Wich, Wich testifying that at the time of the insurance of the policy he explained the nature of his title to the agent asserting that Hess, Voght, and Ell had only a conditional interest in the property; that they had agreed to put in as their part of the purchase price the sum of \$3,000 each within a certain time, and in case of default they would transfer their interests to him; that in the month of May, 1889, Hess, Voght and Ell executed a quitclaim deed to him of their entire interests, thus making him, as he represented himself to be, the sole owner of the property in fee, subject to a certain incumbrance. It is in testimony also that Wich was doing business in the name of The Arkansas Valley Brewing Company, although it does appear from the record that, in response to a direct question as to whether he was doing business in such name, he answered, "No, sir." Yet he qualified this answer immediately afterwards. It further appears that the policy of insurance was issued prior to the signing of the application. The cause was tried to a jury, and at the close of the plaintiff's testimony motion for a non-suit was made and granted. To reverse this judgment this writ of error is prosecuted. Mr. Charles M. Bice and Mr. S. D. Walling, for plaintiff in error.

Mr. C. J. Hughes, Jr., for defendant in error.

412 RICHMOND, *P. J.*, after stating the facts, delivered the opinion of the Court:

The main contention of the defendant company is that the title of the property at the time of the issuance of the policy was not in the plaintiff, and that by terms of the policy it is provided that if the interest of the insured be other than unconditional and sole ownership or not owned by the insured in fee simple, or if any change takes place in the interest, title or possession of the property (except change of occupants without increase of hazard), whether by legal process, judgment or voluntary act of the insured, or if the building remains vacant for ten days * * * then the policy shall be void, the policy may have been issued by the company upon the representations of the plaintiff that he was the owner in fee of the premises, although he claims that at the time he notified the solicitor of the condition of the title. Admitting that the title did not stand in the name of the plaintiff at that time—it certainly did long prior to the destruction of the property by fire—and in keeping

with the understanding of the company at the time of issuing the policy.

"The object of providing against a transfer or change of title is to guard against a diminution in the strength of the motive which the insured may have to be vigilant in the care of his property; the substantial diminution of interest in the property insured has been suggested as a test of the kind of transfer or change of title which will avoid the policy."

In Ayers v. Hartford Fire Insurance Company, 17 Iowa, 176, the court, in discussing what transfer or change of title would avoid the policy, used the following language: "The object of the insurance company by this clause is, that the interest shall not change so that the assured shall have a greater temptation or motive to burn the property, or less interest or watchfulness in guarding and preserving it from destruction by fire. Any change in or transfer of the interest of the insured in the property of a nature calculated to have

this effect is in violation of the policy. But if the real ownership 413 remains the same—if there is no change in the fact of title, but only in the evidence of it, and if this latter change is merely nominal, and not of a nature calculated to increase the motive to burn, or diminish the motive to guard the property from loss by fire—the policy is not violated. * * *" May on Insurance, Sec. 273.

The evidence as disclosed by the record, so far as it relates to the title, clearly brings the parties to this action within the above rule. We are unable to see how it can be claimed by the company that the change in the title constituted a diminution of the interest on the property insured, or a diminution of the motive which the insured may have had to be vigilant in the care of his property. The title subsequently acquired was the title upon which the company acted when it issued the policy. We think it can fairly be argued that, had the title continued in the four individuals above named, the company might have insisted that the policy was void because of the misrepresentations, unless, as it is claimed, the character of the title was fully made known to the agent of the company. If it was, then the following rule is applicable.

"If the interest of the assured is incorrectly stated in the policy, through the mistake or wrongful act of the defendant's agent, to whom the application was made, the facts being truly and fully stated to him, and he having authority to take applications, deliver policies and receive premiums, this would be an answer to a plea setting up a breach of the condition as to the statement of the interest and ownership of the assured;" Brown v. Commercial Fire Ins. Co., 86 Ala. 189; State Ins. Co. v. Taylor, 14 Colo. 499; California Ins. Co. v. Gracey, 15 Colo. 70; Dupreau v. Hibernia Ins. Co., 76 Mich. 615; Mowry v. Rosendale, Receiver, 74 N. Y. 361.

"Possession of real or personal property, claiming it as owner, is prima facie evidence of title, and all presumptions are made in its support, and if the insurer sets up want of title in the assured, he takes the burden of establishing, not only that the assured had no title in the property, but also, that he had no insurable interest therein" * * * Wood on Fire Insurance, vol. 2, p. 202.

414 "The issuance of a policy to a person is *prima facie* evidence of his title to the premises, and unless questioned is conclusive." *Fowler v. New York Insurance Company*, 23 Barb. 143.

The evidence does not show that the risk was in any way increased or made more hazardous by the change of title. On the contrary, it shows that the circumstances under which the policy of insurance was issued, the belief and understanding upon which the company acted, were fully perfected, and that the hazard and risk were identically the same as when the party paid his premium and secured his policy. The mere fact that the deed was originally made to the four individuals upon the understanding existing between Wich and the others—that in case they were unable to fulfill the conditions upon which their title rested by paying a certain sum of money—does not take the case out of the operation of the general rule controlling contracts of this kind. The failure to pay the money would have given Wich an undoubted right of conveyance from them and, as is unusual in such transactions, it seems they recognized their obligation to vest the title in Wich, and did so by a deed making him the sole owner.

The case of *Hough v. City Fire Ins. Co.* 29 Conn. 10, was one where the legal title to the property was in another party, with whom the insured had, at the time of the application, made a parol contract for its purchase, for a price agreed upon, which the insured had agreed absolutely to pay, and a part of which he had paid, and had entered into possession as purchaser, and made valuable improvements. Upon the claim of the insurance company, in a suit on the policy, that the insurance was void by reason of the omission of the insured to state in his application the condition of the title, the court charged the jury that the plaintiff was to be regarded as the owner of the property, if he had the equitable title, and his interest was such that the loss should fall upon him if the property was destroyed. This charge was held to be correct, and the court in its opinion said: "That is to be regarded as an absolute interest, which is so completely vested in the party owning it that he cannot be deprived of it without his consent."

415 *Gaylor et al. v. Lamar Fire Ins. Co.* 40 Mo. 16, was a case where no written application was made before the policy was issued. The verbal representation was simply to the effect that the insured were the owners of the property. The court in the course of its opinion said: "An equitable title that would be protected by a court of equity as such, may be an ownership as absolute as the legal title."

In *Elliott v. The Ashland Mut. F. Ins. Co.* 117 Pa. St. 548, it was said that: "The purchaser of real estate by contract is the equitable owner, and liable to all loss that may befall the property including loss by fire; wherefore, the holder of such title, for the purpose of insurance, may be said to be vested with the entire unconditional and sole ownership of the property."

It is also insisted that the property was insured by the plaintiff in excess of its valuation, and in excess of the amount based upon such

valuation in violation of the policy of insurance. And, also, that the representations concerning the watchman in the building and as to the value of the property were false. All these questions were raised by the pleadings and were questions of fact. And we think the universal rule is that: "It is for the jury to say whether the facts concealed or misstated were material to the risk, and the burden is upon the insurer to establish the materiality of the representation and its falsity. If fraud on the part of the assured is set up in avoidance of the policy, the insurer must establish it by competent affirmative proof, as it will be presumed that the assured acted honestly and in good faith, until the contrary is satisfactorily established. In order, however, to avoid a policy upon the ground of misrepresentation on the part of the assured, it is not necessary that a fraudulent purpose or intent, on the part of the assured, should be established. It is enough if the representation was in fact false, and was material to the risk." Wood on Fire Insurance, p. 572-3.

The question as to whether there has been a breach of warranty, or whether certain representations are false in a substantive manner, is wholly for the jury, and their finding, unless clearly contrary to the evidence, cannot be disturbed. Boos v. The World Mut. Life Ins. Co. 64 N. Y. 236.

416 It is for the jury to say whether or not a misdescription was material to the risk; so as to misrepresentation or concealment, whether there has been a breach of the warranty, and, in a case where the warranty is dependent upon a matter of fact, whether a warranty exists. It is for the jury to say whether there has been a material alteration or increase of the risk, * * * and indeed all questions of fact arising under the issues made are exclusively for the jury, and it is error for the court to trench upon their province. Wood on Fire Insurance, vol. 2, p. 1113-7.

The plaintiff insists that so far as the title was concerned, full and true representations of the condition of the title were made to the representative of the company. It is true they were not made at the time of the application, but the record as it now stands shows that, the application was made and executed after the issuance of the policy and the payment of the premium. What the application may contain, or in what way it may be liable to attack is not now before us, because the application, while it is referred to as a part of the policy, was not introduced in evidence, although an effort was made to that effect by the company. But as to whether these representations are true or not, as to whether the condition of the title was explained or not, is a question of fact and one that should have been submitted to the jury. So, also, the question of the value of the property.

The record clearly discloses a state of facts which entitled the plaintiff to go to the jury.

The judgment must be reversed and the cause remanded for further proceedings.

Reversed.

(Supreme Court of Colorado, May 20, 1895.)

(JONES

v.

ASPEN HARDWARE Co.)

Title of Act—Sufficiency—Transfer to Invalid Corporation—Effect
—Right to Claim as Copartnership.

1. Acts 1887, p. 406, is entitled "An act to fix the fees to be collected by the secretary of state for incorporation, and certain other privileges," the body of the act relating entirely — the fees to be collected for filing certificates of incorporation, etc., and, in addition thereto, providing that no such corporation "shall have or exercise any corporate powers, or be permitted to do any business in this state until the said fee shall have been paid." Held, that such provision is so closely related to the general subject of the act as to be a proper matter for legislation under the title selected.
2. Where a company relies on its corporate capacity, it assumes the burden of establishing the same.
3. To constitute a *de facto* corporation there must be either a charter or a law authorizing the creation of such corporation with an attempt in good faith to comply with its terms, and a user or attempt to exercise corporate powers thereunder.
4. Under Acts 1877, p. 406, §1, providing that no corporation shall have or exercise any corporate powers until the fee for filing its articles of incorporation with the secretary of state is paid, a transfer of property to an association prior to the filing of such articles gives the transferee no title as a corporation.
5. A partnership sold its stock of goods to E., but on his failure to comply with the terms of the agreement, a new arrangement was made to form a corporation, and articles of incorporation were filed with the county clerk. A director's meeting was then held, at which E., who was a director, transferred to the association the stock of goods, the articles of incorporation not having yet been filed with the secretary of state as required by Act 1887, p. 406, §1, and before the same were filed E.'s creditors attached the property so conveyed. Held, that the transferee might maintain an action of replevin as a partnership, and recover the goods.
6. One is not estopped to deny the corporate existence of an association by having dealt therewith, unless there is at least a *de facto* corporation.

Error to District Court, Pitkin County.

Action of replevin by the Aspen Hardware Company against Albert H. Jones. From a judgment for plaintiff defendant appeals. Reversed.

The Aspen Hardware Company instituted this suit in the court below for the purpose of recovering a stock of goods seized
418 by the United States marshal under a writ of attachment issued out of the circuit court of the United States at the suit of Joseph A. Thatcher, plaintiff, against one A. B. Eads. The only question in the case has reference to the corporate capacity of defendant in error, it not having filed, prior to the attachment levy, its certificate of incorporation with the secretary of state, as required by statute, (Sess. Laws 1887, p. 460). In the district court judgment was entered in favor of the company. The statute reads as follows: "Every corporation, joint stock company or association, incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom, or of any state or territory of the United States beyond the limits of this state, having capital stock divided into shares, shall pay to the secretary of state for the use of the state, a fee of ten dollars, in case the capital stock which said corporation, joint stock company or association, is authorized to have, does not exceed one hundred thousand dollars; but, in case the capital stock thereof is in excess of one hundred thousand dollars, the secretary of state shall collect the further sum of ten (10) cents on each and every thousand dollars of such excess, and a like of fee of ten cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of the certificate of incorporation articles of association, or charter of said corporation, joint stock company or association, in the office of the secretary of state; and no such corporation, joint stock company or association shall have or exercise any corporate powers or be permitted to do any business in this state until the said fee shall have been paid; and the secretary of state shall not file any certificate of incorporation, articles of association, charter or certificate of the increase of capital stock, or certify or give any certificate to any such corporation, joint stock
419 company or association, until said fee shall have been paid to him. But this act shall not apply to corporations not for pecuniary profit, or corporation- organized for religious, educational or benevolent purposes." Acts 1887, p. 406, §1.

A. B. McKinley, Hugh Butler, and Wilson & Salmon, for plaintiff in error, W. W. Cooley and H. W. Clark, for defendant in error.

HAYT, C. J. (after stating the facts):

In November, A. D. 1889, Shepard & Bowles, as copartners, were doing a general hardware business in the city of Aspen, and during that month made a sale of their business, stock in trade, good will, etc., to A. B. Eads, the consideration for this transfer being certain real estate and the assumption of certain indebtedness of the firm of Shepard & Bowles. Eads being unable to comply with the terms of the agreement, a new arrangement was made between the parties, and an organization known as the Aspen Hardware Company was formed by Bowles, Eads and one Kettler. The articles of incorpora-

tion provided that the affairs of the company should be managed by a board of three directors, naming Bowles, Eads, and Kettler as such directors for the first year. It was the evident intention of the parties that the company should be duly and legally incorporated, and to this end they caused to be executed articles of incorporation on the 16th day of November, 1889, in due form, and immediately filed the same with the clerk and recorder of Pitkin county. For some reason, not explained by the evidence, the articles were not filed in the office of the secretary of state until after the levy of the writ of attachment hereinafter referred to, and not until the day upon which this suit in replevin was instituted, but whether before or after the commencement of this action does not clearly appear from the evidence. After the articles were filed with the county clerk, the board of directors held a meeting, elected officers, caused capital stock to be issued, etc., Eads being present and participating in this meeting, at which Bowles was elected president, Eads vice-president, and

Kettler secretary and treasurer. Thereupon Eads, for a
420 valuable consideration, sold and transferred the property to the new organization, and Mr. Bowles from that time forward conducted the business for the Aspen Hardware Company, selling goods and purchasing new goods in the corporate name. Eads, soon after the sale left the town of Aspen, and did not return, nor personally take part in the business at that point, but continued as a director and vice president of the company, and retained a portion of his stock, although he had sold a part of it prior to the levy of the writ of attachment. The business was thus continued until July 31, 1890, when a suit was commenced by Thatcher, plaintiff, against A. B. Eads, and the property in question levied upon as the property of the defendant in that suit, and this action of replevin was immediately instituted to recover possession of the property, or its value.

The controversy in this case is narrowed to the single question of the capacity of defendant in error to take title to the property in controversy as a corporation at the time of the attempted transfer by Eads, it not having at that time filed its articles of incorporation with the secretary of state, or paid the fee for such filing, as provided by the statute of 1887. Ses. Laws, 1887, p. 406. This is the first time the effect of this statute has been before this court for consideration, although in Edwards v. Railroad Co., 13 Colo. 59, 21 Pac. 1011, the constitutionality of a somewhat similar act was under review. That act was attacked upon several grounds, among which was that it was void because the subject was not clearly expressed in the title, the title being "An act to provide for the formation of corporations"; and it was held that this title was sufficient to cover legislation requiring a fee to be paid for filing the certificate of incorporation, under the principle that the same was germane to the general subject expressed in the title, and that legislation fixing the amount of such fee, time of payment, etc., was not obnoxious to the constitutional provision with reference to titles. The act of 1887, now under
421 consideration, is entitled, "An act to fix the fees to be collected by the secretary of state for incorporation and certain other privileges." The body of the act however, relates entirely to

the fee to be charged and collected for filing certificates of incorporation, articles of association, charters, or increase of capital stock of joint stock companies, and, in addition thereto, provides that no such corporation, joint-stock company, or association "shall have or exercise any corporate powers or be permitted to do any business in the state until the said fee shall have been paid. * * * This provision is so closely allied to the general subject, which is the fixing of fees for filing certificates of incorporation, etc., that under the uniform rule of decisions in this state it must be held to be a proper matter for legislation under the title selected. *Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142; *People v. Goddard*, 8 Colo. 432, 7 Pac. 301; *People v. Scott*, 9 Colo. 422, 12 Pac. 608; *Dallas v. Redman*, 10 Colo. 297, 15 Pac. 397; *Edwards v. Railroad Co.* supra. *In re Pratt*, 19 Colo. 138, 34 Pac. 680. In this case the Aspen Hardware Company claims title to the property in dispute in its corporate capacity, and not as a copartnership. It is admitted that the fee for filing the certificate of incorporation with the secretary of state was not paid prior to the levy of the writ of attachment, and that the certificate was not filed in the office of the secretary of state until about the time of the bringing of the present action, the evidence leaving the exact time uncertain. It is to be remembered that in this case the corporation is the party plaintiff, and it may be stated as a general rule that when a company relies — its corporate capacity it assumes the burden of establishing such capacity. The language of the act is plain and unambiguous. It reads, "No such corporation * * * shall have or exercise any corporate powers." * * * The taking of title to property was certainly the exercise of a corporate power, and as such prohibited by the express terms of the statute. This is not contro-

verted by counsel for appellee, but it is contended that Eads, 422 having assisted in the organization of the corporation, and having sold to it the hardware stock, is estopped from denying the corporate existence of the company, and that the attaching creditor took the property subject to the same estoppel. The doctrine of estoppel cannot be successfully invoked, we think, unless the corporation has at least a *de facto* existence. The rule is stated as follows by Morawetz on Private Corporations (section 750), it having been first announced in the case of *Brouwer v. Appleby*, 1 Sandf. 158; "A defendant who has contracted with a corporation *defacto* is never permitted to allege any defect in its organization as affecting its capacity to contract or sue, but that all such objections, if valid, are only available on behalf of the sovereign power of the state." It is also well settled that to constitute a *de facto* corporation there must be either a charter or a law authorizing the creation of such a corporation, with an attempt in good faith to comply with its terms, and also a user or attempt to exercise corporate powers under it. *Duggan v. Investment Co.*, 11 Colo. 113; 17 Pac. 105; *Bates v. Wilson*, 14 Colo. 140, 24 Pac. 99. A *de facto* corporation can never be recognized in violation of a positive law. This principle, which seems to be supported by all the authorities is thus stated by Morawetz on Private Corporations (section 758): "If the formation of a corporate association is not only prohibited by this general rule of the common

law, but is also in violation of some principle of morality or public policy, or a positive statutory prohibition, the parties forming such association will not be legally bound by their agreement of membership, and the courts will not recognize the association, either as among its members or against third parties." To recognize the defendant as a *de facto* corporation, would, as we have seen, be in direct conflict with the express language of the act, which declares that without the payment of the fee the corporation shall have no corporate power.

423 One object of this statute is to restrict the organization of "wild-cat" corporations, it being supposed that the increased fee required by the act would, in a measure at least, prevent the over-capitalization of companies. The legislature being of the opinion that this purpose would be advanced by requiring the fee to be paid as a condition precedent to the exercise of any corporate power, it is the duty of the courts to give effect to this intent as the same is manifest from the plain language of the act. The taking of title to the property in controversy being the exercise of a corporate power, and, as such, forbidden until the fee for filing has been paid, it follows that the title of the Aspen Hardware Company as a corporation cannot be upheld. Having failed to comply with the statute, the Aspen Hardware Company, at the time of the transfer, was neither a *de jure* nor a *defacto* corporation, but simply a voluntary association of individuals in the nature of a copartnership.

There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers and those acts required of individuals seeking corporation, but not made prerequisites to the exercise of such powers. "In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the incorporation is responsible only to the government in a direct proceeding to forfeit the charter." Abbott v. Refining Co., 4 Neb. 416. The omission in this case is of acts of the former class, and consequently there was no corporation in esse at the time of the levy of the writ, while the evidence leaves it in doubt if this omission had been supplied prior to the institution of the present action. But although it could not at the time exercise any corporate power, this did not prevent the Aspen Hardware Company from taking title to the property as a copartnership. In other words under the conceded facts, the company was not at the

424 time a corporation, but this will not preclude it from maintaining the action as a copartnership. The plaintiff sues as the Aspen Hardware Company, and the facts alleged show that such company was a copartnership and not a corporation. There is nothing in the name of the association to conflict with this, as at common law partners may carry on business under any name they choose. They are bound rather by their acts than by the style which they give to themselves. Cook, Stock & Stock, §233; Chaffe v. Ludeling, 27 La. Ann. 607. This principle has been applied in many cases where parties have set up the defense of individual nonliability by

reason of having directed an incorporation to be had, but where none in fact was consummated. Cook, Stock & Stock. §§233, 234; Abbott v. Refining Co., *supra*; Empire Mills v. Alston Grocery Co., (Tex. App.) 15 S. W. 505. The law having cast this liability upon the members of the associations, we think they must be given the advantages accorded a copartnership. So, in this case, while we feel compelled under the statute to deny plaintiff's right of recovery as a corporation. We think they may maintain the action as a copartnership. The cause will accordingly be reversed and remanded, with directions to the district court to allow the parties to amend their pleadings as they may be advised. Reversed.

425

(118 Pac. Rep. 988.)

(Supreme Court of Colorado, Nov. 6, 1911.)

WESTERN ELECTRICAL CO.

v.

PICKETT et al.

1. Limitation of Actions (Sec. 118*)—Foreign Corporations—Right to Sue—"Prosecute."

Rev. St. 1908, sec. 904, provides that no foreign corporation may do any business or prosecute or defend in any suit in this state until the fee prescribed has been paid to the Secretary of State, and section 910 provides that no foreign corporation shall do any business or prosecute or defend in any suit in this state until it receives from the Secretary of State a certificate that full payment of fees required has been made by it. Held, that an attempted suit by a foreign corporation doing business within the state without having paid the fee required would not suspend the running of limitations, since a corporation not complying with the statutes cannot institute suit in this state; the word "prosecute," as used, meaning to bring suit against in a court for redress of wrong, to carry on a judicial proceeding against, or to seek to enforce a claim or right by legal process.

(ED. NOTE.—For other cases, see Limitation of Actions, Dec. Dig. Sec. 118.*

For other definitions, see Words and Phrases, vol. 6, pp. 5734, 5735.)

2. Corporations (sec. 661*)—Foreign Corporations' Right to sue.

Compliance with the statute by foreign corporation by paying the fee required, so as to authorize it to prosecute suits within the state, after it has already commenced an action, will not make the action valid from its institution up to the time the statute was complied with.

(ED. NOTE.—For other cases, see corporations, Dec. Dig. Sec. 661.*)

3. Limitation of Actions (sec. 183*)—Pleading Limitations—Denial of Cause of Action—Actions for Penalties.

In an action by a private corporation for a penalty claimed to accrue because of defendant's violation of another statute, defendants, by denying plaintiff's cause of action, could claim the benefit of Rev. St. 1908, sec. 4068, requiring all actions for any penalty brought by any person to whom the penalty is given to commence within one year after the offense is committed.

(ED. NOTE.—For other cases, see Limitation of Actions, Cent. Dig. secs. 683-692; Dec. Dig. sec. 183.*)

Error to District Court, El Paso County; W. S. Moore, Judge.

Action by the Western Electrical Company against Charles D. Pickett and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. M. Swift and J. E. McIntyre, for plaintiff in error. McKesson & Little, T. C. Turner, and John R. Watt, for defendants in error.

426 HILL, J.:

This controversy is over the meaning to be given a portion of general sections 904 and 910, Revised Statutes 1908. That portion of section 904 involved reads: "No such corporation, joint stock company or association shall have or exercise any corporate powers or hold or acquire any real or personal property, franchises, rights or privileges, or be permitted to do any business or prosecute or defeat in any suit in this state until the said fee shall have been paid." The portion of section 910 involved reads: "No corporation * * * of any foreign state or kingdom * * * shall exercise any corporate powers or acquire or hold any real or personal property, or any franchise, rights or privileges, or do any business or prosecute or defend in any suit, in this state until it shall have received from the Secretary of State a certificate setting forth that full payment has been made by such corporation."

On January 12, 1906, the plaintiff in error, a nonresident corporation, attempted the institution of this action by filing its complaint and causing a summons to be issued thereon. Thereafter, first by motion and then by answer, the defendants challenged the right of the plaintiff to prosecute this action; it being a foreign corporation, organized for pecuniary profit, which was doing business in the state of Colorado, and the transactions out of which this litigation arose accrued in this state while it was doing business here. Also, the defendants pleaded the statute of limitations. The cause was tried to the court upon April 4, 1908, upon an agreed statement of facts together with a special demurrer. Judgment was for the defendants for costs. The plaintiff brings the case here for review upon error.

The allegations of the complaint and the admitted facts justify the conclusion that the plaintiff was a nonresident corporation or-

ganized for pecuniary profit; that it was doing business in this state within the meaning of the statute; that all the transactions involved transpired in this state, so that no questions of interstate commerce, comity between sister states, or otherwise, are involved. The record discloses that at the time the original complaint was filed (on January 12, 1906) the action was not then barred by the statute of limitations, but would have been on the 10th day of July, 1906, unless, by some action of the plaintiff, its operation was suspended. On March 7, 1906, the defendants, by motion, raised the question of the right of the plaintiff to prosecute this action; it not having then complied with the statute. This motion appears to have been overruled. Thereafter, and on the 16th day of July, 1906, the defendants by answer raised the same question. On June 22, 1907, which was before final trial, the plaintiff complied with the laws of Colorado in respect to foreign corporations.

This presents three questions for consideration: First. Did the plaintiff, it not having then complied with our laws, have a right to institute this suit, or proceed with any steps in its prosecution after its right to do so was challenged? Second. Did the plaintiff have the right to proceed with the prosecution of its suit after it was challenged, by thereby complying with the laws of this state in respect to foreign corporations? Third. If the plaintiff had the right to proceed with the prosecution of its action by thereafter complying with the laws of this state in respect to foreign corporations, did the attempted institution of its action in January, 1906, have the effect to at that time suspend the operation of the statute of limitations, and keep it so suspended until it thereafter complied with the law, or did it continue to run in favor of the defendants until the law in this respect was complied with by the nonresident corporation. If the last question is answered in the negative, it makes unnecessary any decision upon the first two.

There seems to be an irreconcilable conflict of authorities upon the entire question of such statutes. One line of authorities holds that all such contracts made by foreign corporations doing business in this state prior to the compliance with the act are void, and cannot thereafter, or at all, be enforced. Section 7950, vol. 6 (1st Ed.) Thompson on Corporations.

Another line of cases holds that contracts made by such corporation while doing business in this state with citizens of the state, before complying with such conditions, are not absolutely void; but the statute merely operates to suspend the remedy of the foreign corporation in the courts of the state upon such contracts until it shall have complied with the statutory conditions. This is upon the theory that until such compliance an action by the foreign corporation to enforce the contract is prematurely brought, so that an answer setting up the noncompliance by the foreign corporation would be an answer in the nature of a plea in abatement, and judgment in favor of the defendant would operate merely to abate the suit. Section 7956, Thompson on Corporations, vol. 6 (1st Ed.).

This court appears to be committed to this last line of authorities upon the question that such contracts are not absolutely void. Utley

et al. v. Clark-Gardner L. M. Co., 4 Colo. 369; Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; International Trust Co. v. Leschen & Sons Co., 41 Colo. 299, 922 Pac. 727. Other well-reasoned cases, under similar statutes, seem to take the view that the plea in abatement is good, and upon account thereof an action instituted prior to a compliance with the act should be dismissed, and the plaintiff be compelled to comply with the provisions of the statute, and then to institute a new suit, in order to be allowed to prosecute its alleged cause of action. In the case of Caesar v. Capell (C. C.) 83 Fed. 403, in commenting upon a somewhat similar statute of the state of Tennessee, the court, speaking through Mr. Justice Hammond, quoted with approval from volume 6, Thompson on Corporations, as follows: "A failure to comply with the regulations of the statute does not make the contract absolutely void, but only operates to suspend the remedy until such time as the foreign insurance company shall comply with the statute; that until such compliance should take place any suit brought to enforce the contract would only — prematurely brought, and a plea setting up the defense should be, not a plea in bar because of the invalidity of the contract, but only a plea in abatement to dismiss the particular suit." To the same effect is Crefeld Mills v. Goddard (C. C.) 69 Fed. 141, where it was held that the effect of such a statute is not to invalidate contract made in the state by a foreign corporation doing business there without a certificate, but only to suspend the remedy until such certificate has been procured. The New York Act involved in that case states, in substance, that no foreign corporation shall do business in that state without having first procured from the Secretary of State a certificate, etc., and, further, that no such corporation doing business in that state without such certificate shall maintain an action in the state upon any contract made by it in that state until it shall have procured such certificate. In that case the court also said: "In many cases the delay to which a delinquent corporation would be subjected while endeavoring to secure a certificate might be injurious, and perhaps fatal, to its remedy upon a contract; and, doubtless, the Legislature was of the opinion that the suspension of the remedy during the interim would furnish a sufficient incentive to coerce a compliance with the law." To the same effect is the case of Neuchatel Asphalt Co., Limited, vs. Mayor, etc., of New York, 155 N. Y. 373, 49 N. E. 1043.

(1) But it is unnecessary to determine whether or not the plaintiff by complying with the act after the question was raised, had a right to continue the same action thereafter. The only question necessary to determine is: was the running of the statute of limitation suspended by the attempted institution of the suit before compliance with the act? We answer in the negative. Our statute, in substance, says that no such corporation shall do business until this fee is paid and other acts complied with. It does not state that any contracts so made shall be absolutely void, but it does state, 430 positively, that no such delinquent corporation shall prosecute or defend in any suit until the act is so complied with, and we think, as here used, the word "prosecute" includes the insti-

tution of the suit. The Standard Dictionary defines "Prosecute": "To bring suit against, in a court, for redress of wrong or punishment of a crime; to carry on a judicial proceeding against, as to prosecute a criminal; to seek to enforce or obtain as a claim or right, by legal process; to begin and carry on a legal proceeding." Webster defines "prosecute": "To seek to obtain by legal process; the institution and carrying on of a suit in a court of law or equity." The Universal Dictionary defines "prosecute": "The instituting and carrying on of a suit in a court of law or equity to obtain some right, or redress and punish an injury or wrong." In *Hickox v. Elliott* (C. C.) 22 Fed. 19, the word "prosecute" as there employed in a Code of Civil Procedure was held to be used in the sense of "commence."

With these definitions in mind, and the sense in which the word appears to be used in these sections, it seems to us that no other construction can be placed on the word "prosecute" than to construe it as a prohibition against the bringing of an action, for the bringing of an action is certainly one of the necessary steps in its prosecution. This conclusion appears to be supported by the great weight of authority. *MERCHANTS' INSURANCE CO. V. LACROIX*, 35 Tex. 249, 14 Am. Rep. 370; *Heileman Brewing Co. v. Peimeisi*, 85 Minn. 121, 88 N. W. 441; *Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; *Ehrhardt v. Robertson Bros.*, 78 Mo. App. 404; *Am. Copying Co. v. Eureka Bazaar*, 20 S. D. 526, 108 N. W. 15, 9 L. R. A. (N. S.) 1176. To hold otherwise, and give it the constructive urged on behalf of the plaintiff, would invite and foster the very evil it was intended to prevent. It would enable any foreign corporation, not only to do business in this state in defiance of our laws, but also to prosecute

its suits for the enforcements of such business until some
431 party perchance pleaded its noncompliance in an action

brought by it to enforce a demand against him, then it would comply with the act, proceed with the action, and have its validity recognized from its inception and during the entire time it was prosecuting it, in the face of a positive prohibitory act to the contrary. Such a construction is contrary to the letter and spirit of the statute, and, if adopted by the court, would directly tend to defeat the public policy sought to be enforced by its enactment. The most efficient way to compel obedience to this statute is to enforce it as it reads, and not amend it by judicial construction, so as to enable foreign corporations to avoid the consequences of a noncompliance with its terms by complying after the penalties have been incurred.

(2) Compliance after the commencement of an action will not remove the bar of the statute, so as to give effect, and recognize the validity of the action from its inception up to the time the statute was complied with. *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 56 N. E. 1106; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; *Ehrhardt v. Robertson Bros.*, 78

Mo. App. 404; Tri-state Amus. Co. v. Amusement Co., 192 Mo. 404, 90 S. W. 1020, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511; G. Heilerman Brewing Co. v. Peimeisi, 85 Minn. 121 88 N. W. 441. The same principle involved here was under consideration in the case of Thompson Co. v. Whitehead, *supra*, where it was held that a foreign corporation, which had not complied with the statute concerning the obtaining of a certificate authorizing it to do business in Illinois at the time of the levy of an attachment upon goods situate in that state, but in the possession of a foreign assignee for creditors, cannot be regarded as a domestic corporation, nor does it acquire any rights by virtue of its levy, since, under such circumstances, the law denies its right to maintain any action in Illinois until it has complied with the statute. In that case that

court said; "The provisions of that portion of section 3 of 432 said act hereinbefore mentioned declared the appellant company should not, in consequence of such noncompliance, be permitted to maintain any suit or action, legal or equitable, in any of the courts of the state on any demand, whether arising out of contract or tort. No reason is perceived why the provisions of this act should not have full operation. Given such operation, the appellant company had no standing in the courts of Illinois to enforce a demand, and the instance it was entitled to the privileges accorded by the policy of our law to a domestic or resident creditor is wholly untenable. It had no right to invoke action of any kind, under the laws of this state, in aid of the enforcement of any contract or the collection of any debt. It was proven the appellant company applied to the Secretary of State on the 19th day of August, 1897, which previous to the hearing of this cause, for a certificate of compliance with the provisions of the enactment under consideration, but did not complete its application to the satisfaction of the Secretary of State until September 11, 1897, upon which date it received its certificate. But its rights are to be determined (at the latest) as of the date of the levy of the writ. If it did not secure a lien upon the property in dispute by the levy of the writ of attachment, it was powerless to interfere with the possession and control of the goods by the assignee. It had not then complied with the conditions fixed by the statute as a prerequisite to its right to invoke the aid of the courts of this state, and the right of the appellee assignee to retain the possession of the goods was superior to any right which could be obtained by the appellant company by virtue of the writ issued in a suit which it had no legal standing to institute."

We think this reasoning applicable here. To hold that the attempted institution of the action, without first complying with the law, suspended the running of the statute of limitations against the claim, when the law provides that it shall institute no 433 such action without first paying the fee, would be to abrogate the only inconvenience or penalty which has been placed upon the non-resident corporation for its failure to comply with the provisions of the act and its violation of our law. We con-

clude that the running of the statute of limitations was not barred until the plaintiff had the right to, and had, lawfully, instituted its action in the courts of Colorado; in other words, its attempted institution of the suit, when the laws of this state provide specifically that it shall have no right to prosecute any suit until the fees are paid, is the institution of no suit at all. This being the penalty provided, to recognize the validity of the suit to the extent of allowing it to stop the running of the statute of limitations would be to relieve the plaintiff of the only penalty or prohibition which the Legislature has seen fit to place upon it for its noncompliance with the laws of our state, to wit, that it shall not be allowed to prosecute or defend until it has complied with the provisions of our statutes.

(3) It is further argued by the plaintiff that the plea of limitation was not presented in apt time, and for that reason cannot be considered. We cannot agree with this contention. This plea could not have been made at the time of the attempted institution of the original suit, for the reason that the statute at that time had not yet run against the claims. The plea, however, was thereafter properly presented. The action against the defendants is for a penalty for the alleged violation of another statute upon their part, and under the ruling in the case of Atchinson, Topeka & Santa Fe R. R. Co. v. Tanner, 19 Colo. 559, 36 Pac. 541, the defendants were entitled to the benefit of the statute under a plea denying the plaintiff's cause of action, which depended upon its being brought within one year next after the offense was committed; it being covered by general section 4068, Revised Statutes 1908.

The judgment is affirmed.

Affirmed.

Musser and Gabbert, J.J. concur.

434

(72 Pac. Rep. 1067.)

(Supreme Court of Colorado, June 1, 1903.)

(IRON-SILVER MIN. CO.

v.

COWIE.)

Supreme Court—Jurisdiction—Question of Franchise—Corporation—Term of Existence—Foreign Corporation—Compliance with Extension Act.

1. Where mandamus was instituted by a corporation to compel the Secretary of State to issue to it a certificate of payment of fees and taxes, in order to test the corporation's legal existence, and that question was treated by the parties as the only one in the case, and the writ was denied on the sole ground that the corporation's existence had terminated, a question of fran-

chise was necessarily involved, and the Supreme Court had jurisdiction of the appeal.

2. Mills' Ann. St. § 473, limits the term of existence of corporations for business purposes to 20 years. Section 499 subjects foreign corporations doing business in the state to all the liabilities and restrictions imposed on domestic corporations, and provides that they shall have no other powers. Sess. Laws 1899, p. 163, c. 89, provides the terms on which a corporation organized under the laws of the state may have its term of incorporation extended. Held, that a foreign mining corporation, although authorized in the state of its creation to exist for 50 years, cannot prolong its existence in the state for more than 20 years without complying with the extension act.

Appeal from District Court, Arapahoe County.

Mandamus by the Iron Silver Mining Company against James Cowie, Substituted for David A. Mills, as Secretary of State. From a judgment denying the writ, plaintiff appeals. Affirmed.

J. A. Ewing, for appellant, Nathan C. Miller, Atty. Gen. and I. B. Melville and Henry J. Hersey, Asst. Atty.-, Gens. for appellee.

CAMPBELL, C. J.:

The appellant company filed its certificate of incorporation in the office of the Secretary of State of the state of New York on the 4th day of March, 1880, and thereby, under the laws of that state, became an incorporated company, with authority to engage in mining. On the 18th of the same month it complied with all the conditions of the laws of Colorado to which a foreign corporation must submit in order to secure the right to begin business in this state. Thereafter it acquired mining property situate in this state, and herein carried on the business for which it was incorporated.

By section 473, Mills' Ann. St. the term of existence of a similar corporation organized under the laws of this state cannot exceed twenty years, and by section 499, Mills' Ann. St. foreign corporations which are permitted to do business in this state are subject "to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers." By section 11 of the act of April 6, 1901 (Sess. Laws, 1901, p. 121, c. 52), corporations doing business in this state, both domestic and foreign, are required to make, and file in the office of the Secretary of State, annual reports giving the information which the act calls for. In conformity therewith, appellant, on the 14th of February, 1902, made and executed its annual report, and presented the same to the Secretary of State for filing, tendering the necessary fee therefor, and demanded, as the act provides, that the Secretary of State issue to it a certificate setting forth the fact that full payment

had been made by appellant of all the fees and taxes prescribed by law to be paid. But the Secretary of State refused to accept or file the report and to execute the certificate demanded, and based his refusal upon the assertion that the corporate existence of appellant terminated on the 18th day of March, 1900—20 years after the copy of its certificate of incorporation was filed in the office of the Secretary of State of Colorado—and that appellant had not complied with our laws, applicable, as he says, both to domestic and foreign corporations, which permit them to extend the term of their incorporation by doing certain things and paying the prescribed fee. Sess. Laws 1899, p. 163, c. 89. Thereupon appellant, as plaintiff below, brought this action for a writ of mandamus to compel the Secretary of State to file its annual report and issue the certificate in question. The district court denied the application and dismissed the action, and its judgment is brought here for review.

1. Upon the oral argument the court, of its own motion, raised the question of its jurisdiction. Unless a franchise is involved, it does not possess it. The right of the appellant company to 436 exercise any of its franchises within this state might have been raised by a proceeding in the nature of quo warranto at the instance of the Secretary of State. The avowed object of the present action was to test the question as to whether or not plaintiff has a legal existence within this state, and that question has been by both parties treated as the only one in the case. The denial of the writ of mandamus rested altogether upon a decision by the trial court that appellant's legal existence within this state terminated before its annual report was presented for filing. In other words, the judgment below was based upon a judicial determination that appellant could no longer exercise any corporate franchise within this state. A franchise, therefore, is necessarily involved in the controversy, which properly invokes the jurisdiction of this court. C. & W. I. R. R. Co. v. Dunbar, 95 Ill. 571; Coal & Mining Co. v. Edwards, 103 Ill. 472; Memphis R. R. Co. v. Commissioners, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed., 831; 6 Thompson on Corporations, § 7902.

The position of appellant is that the clause of section 499, above quoted does not apply to the creation and organization of foreign corporations, but only to the things which domestic corporations are restricted from doing in carrying on their business, and subjects foreign corporations only to such liabilities as apply to domestic corporations, in carrying on their business, after their creation. This provision is substantially the same as the Illinois law, from which apparently it was copied. Its interpretation has been before the Supreme Court of that state, and in Stevens v. Pratt et al., 101 Ill. 206, 217, Mr. Justice Schofield said: "Where the general laws of this state provide for the organization of corporations, foreign corporations of like character doing business in this state shall exercise no greater or different powers, and shall be subject to the same liabilities, restrictions, and duties. The manifest and only purpose was to produce uniformity in the powers, liabilities, duties, and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law." In Barnes v. Sud-

437 dard, 117 Ill. 237, 7 N. E. 477, it was said that foreign corporations shall have no other or greater powers than domestic corporations. To the same purport is *Harding v. Amer. Glucose Co.*, 182 Ill. 551, 635, 55 N. E. 577, 74 Am. St. Rep. 189. Whether appellant's construction of this clause is right or wrong is not important in this case. Though the laws of New York conferred upon appellant the right to be a corporation for 50 years, our laws restrict a corporation of like character, if organized here, to a term of 20 years. The right to be and do business as a corporation is a franchise. The power to exercise such a franchise is one of the most important a corporation can acquire. And if appellant can do business in this state for more than 20 years without complying with the extension act, its powers in carrying on that business would be greater than those of similar domestic corporations. Such acts relate strictly to things done subsequent to the creation of the corporation. And the claim that a foreign corporation may prolong its existence beyond the term to which a similar domestic corporation is limited is as clearly untenable under our statute as would be a claim that, because the laws of the state creating it sanction a certain business, a foreign corporation may pursue it here though our laws expressly prohibit it. It is too clear for argument that, if a foreign corporation is permitted to continue its legal existence within this state for more than 20 years without complying with our statute relating to such extensions, instead of there being that uniformity in the powers, liabilities, duties, and restrictions of the two kinds of corporations which it was the object of this clause to secure, a discrimination would be made in favor of the foreign, and against the domestic, corporation. The duties of the foreign would be less onerous, and its powers greater, than those of a domestic corporation, and this our General Assembly never intended. If, however, the language quoted is not applicable to the facts of the case in hand, or if we had no such provision, we think that appellant would not prolong its corporate existence beyond the period of 20 years unless, indeed,

438 like domestic corporations, it complies with the extension act—because that would be contrary to the public policy of our state, which, affirmatively appearing in our legislation, is to restrict domestic corporations of like character to 20 years.

It is well settled that a corporation has no implied authority to do any act in a state other than that of its creation. But, by the courtesy that exists between the different states, a foreign corporation, may transact its business in another state, subject to all the laws and regulations of the latter; yet if it attempts to do that which is contrary to the public policy of the latter state, it will be enjoined therefrom. 2 *Morawetz on Private Corporations*, (2d Ed.) §§964, 965, et seq.; 2 *Cook on Corporations* (2d Ed.) §896; *People v. Howard*, 50 Mich. 239, 15 N. W. 101; 6 *Thompson on Corporations*, §7894; 13 *Am. & Eng. Enc. Law* (2d Ed.) 860. A corporation organized under the laws of Colorado for the purpose of carrying on mining can exist not to exceed 20 years. If it desires to continue its corporate existence beyond that period, it may do so upon compliance with the statute of 1899 to which we have

adverted. Appellant must do likewise. Not having done so at the time it presented to the Secretary of State its annual report for filing, and more than 20 years having elapsed after it was authorized to do business here, the Secretary of State was justified in his action; for the right of appellant company to be a corporation and exercise its franchises in this state had terminated, and could be prolonged only by conforming to the act of 1899, which it neglected to do.

The judgment is affirmed. Affirmed.

439

(25 Pac. Rep., 325.)

(Supreme Court of Colorado, Nov. 7, 1890.)

COLORADO IRON-WORKS

v.

SIERRA GRANDE MIN. CO.

Foreign Corporations—Doing Business within State—Service of Process.

1. A single purchase of machinery within the state by a foreign mining corporation, to be transported to and set up in the state of its domicile, is not within the inhibition of Gen. St. Colo. sec. 260, which prohibits foreign corporations from doing business *with* the state until they have filed with the Secretary of State a certificate designating their principal place of business within the state, and appointing an agent upon whom process may be served.
2. But the purchase of machinery by the foreign corporation is a sufficient doing of business in the state to render it amenable to the jurisdiction of the courts of the state, so far as the enforcement of the purchase price is concerned, if jurisdiction can be obtained as provided by the laws of the state.
3. One who gratuitously transfers his stock in a foreign corporation to trustees, whose names he does not know, for some unknown and undefined purpose, and at the same time contributes \$50 to cover the expense of the transfer, is still a stock holder in such foreign corporation, within the meaning of the Civil Code Proc. Colo. sec. 40, which authorizes the service of process on a foreign corporation by a delivery of the writ to a stockholder, when it has no agent or officer within the state.

Commissioner's Decision.

Appeal from District Court, Arapahoe County.

The appellant, plaintiff below, is a domestic corporation doing business in the City of Denver; the appellee is a foreign corporation organized under the laws of, and engaged in mining in, the

territory of New Mexico. In August, 1885, the two corporations entered into a written contract by which appellant was to manufacture, furnish, and erect at the mines of appellee in New Mexico, certain machinery and appliances for the reduction of ores, for \$39,260. The contract was made by the general manager or agent of appellee in its behalf, and was to become operative upon its receiving the signature of the president. Payments were to be made,—\$10,000 upon the signing of the contract by the president; \$15,000 upon the shipment by appellant of the heavy machinery; \$5,000 when the work was completed, and the balance when the work was accepted by a committee, within 30 days after its completion.

- 440 As far as is shown by the record, the contract was fully performed by appellant and the work accepted by appellee. It is alleged in the complaint that appellant furnished extra supplies and labor, to the amount of \$3,340. It is admitted that certain payments were made, and alleges the balance remaining unpaid to have been \$11,987.97. It is also alleged that a settlement was had at the city of Denver on the 25th of February, 1886; that the balance found due and agreed upon was as above stated, viz., \$11,987.97. On the 13th day of November, 1886, this suit was brought to recover such balance, with interest from the alleged date of settlement. Summons was issued, which was returned with the following indorsement: "State of Colorado, Arapahoe county—ss; I do hereby certify that I have duly executed the within summons on this 13th day of November, A. D. 1886, by delivering a true copy of the same to Samuel Alsop, a stockholder of the with-named defendant, the Sierra Grande Mining Company, personally, at the city of Denver, in the county of Arapahoe, and state of Colorado. I further certify that said corporation keeps no principal office in any county in the state of Colorado, and there is no county in which the principal business of said corporation is carried on, and that no president, or other head of said corporation, or vice-president, secretary, treasurer, cashier, general agent, general superintendent, or agent thereof, could then be found, or was then or can now be found, or is now in the county of Arapahoe, state of Colorado, but each and every officer was then, and is now, absent from said county; and I further certify that, at the same time and place, I delivered to said Alsop a copy of the complaint herein. Frederick Cramer, Sheriff. By J. M. Chivington, Under Sheriff." On the 22nd of November, the following motion was filed by counsel of appellee: "Now comes the defendant, the Sierra Grande Mining Company, by its attorney, R. H. Gilmore, and appears specially for this purpose, and no other, and moves the court that the summons herein be quashed, on the ground that it appears upon the return thereon, and on the face of the complaint served therewith, that defendant is a foreign corporation, not doing business within the state of Colorado, and that the said summons was not served upon the proper person, as prescribed by law." On the 9th of December, appellee, by its counsel, presented the following paper: "Making special appearance, and moves the court that

the summons and the return thereon be quashed, and that defendant be not compelled to answer the complaint, on the ground that this court has no jurisdiction of person of defendant; states that defendant is a foreign corporation, organized and incorporated under the laws of New Mexico, and not elsewhere; that no summons has been served on it in this state, or elsewhere; that, at the time of pretended commencement of this action, or at any time previous thereto, or since, it was not and is not doing business in this state, and that it has no principal or other office in any county in this state, nor had it at the time of commencement of this action, nor at such times had it any principal or other place of business or of doing business in this state; nor had it at the time of pretended commencement of this action, or before or since, residing in this state or having any office or place of business in this state, any president, secretary, treasurer, cashier, general agent general superintendent, or agent, or any other representative, stockholder, or other person, who in any manner represented it, or who was by it authorized to receive service of summons or other processes in this state; and further that said Samuel Alsop, J., did not at the time of the service of the summons in this action, nor did he at any time before or since, represent the defendant in any capacity whatever, official or otherwise, in the state of Colorado, or elsewhere; nor was he at such time or times in this state in any official character or capacity as an agent, officer, or representative of defendant; nor was he doing at such time or times any business for said company in this state, or elsewhere; nor was he authorized to do any business for the defendant, or to represent it as an officer or agent, or to receive service of summons or other process.

And further, said Alson was not at the time of said service, a stockholder, officer, agent, or representative of defendant. The Sierra Grande Mining Company of New Mexico. By R. H. Gilmore, Its Attorney. Verified by R. H. Gilmore, as attorney." On January 4, 1887, a hearing was had upon the motion of appellee of November 22d, when the following proceedings were had, and order entered: "The defendant, by its attorney, R. H. Gilmore, Esq., who appears specially only in this action, asks leave to have its motion to quash the summons and return in this case, which was filed on December 9, 1886, to stand in lieu of its former motion for a similar purpose, served upon the plaintiff on the twenty-second day of November, 1886, and which is now by direction of the court, upon plaintiff's request filed herein as of said twenty-second day of November, 1886, and it is accordingly so ordered without prejudice to the plaintiff's right to object to such substitution, or to any advantage which plaintiff may have been given by the service of said former motion." On the 7th of January, counsel of appellant filed a motion to strike from the files appellee's motion of December 9th, for the following reasons: "That the defendant had already, before that date, served on plaintiff herein a motion to quash the summons, which was by the court ordered filed as of November 22, 1886, and that defendant had already appeared in said action and waives all the matters set forth in said motion, and said motion was not filed in apt time, and moving for judgment as for want of an answer."

On January 27th, counsel of appellee moved the court for leave to withdraw its motion ordered to be filed as of November 22d. On January 31st, an affidavit of Alsop that he was not a stockholder of appellee at the time of the service of the summons, also affidavits of Mellor, president, and Brosius, secretary, of appellee,
443 made in Philadelphia, that Alsop was not a stockholder, were filed. A hearing was upon the motion of appellant to strike appellee's motion of December 9th from the files, and appellee's motion for leave to withdraw the motion of November 22d. Both motions were denied, and the court ordered "that both the former and the latter motions, attacking the service of the summons herein, and the jurisdiction of the court over the person of the defendant, be allowed to stand as an answer or a motion in plea in abatement to the jurisdiction of the court over the person of the defendant, and that the plaintiff have leave to reply to said motions of the defendant as it shall be advised in twenty days from this date." Appellant excepted to the judgment of the court in denying the motion to strike the motion from the files. On February 18, 1887, appellant replied as follows to appellee's answers or motions for -leas in abatement: Now comes the plaintiff in the above entitled action, and makes this, it- replication, to the motions of the defendants, heretofore ordered by the court to be taken as a plea in abatement or answer herein, and alleges the issuance of summons and service and return thereof setting out the returns in full; denies that defendant was not at any time previous to the commencement of this action doing business in this state, but, on the contrary, alleges that said defendant did, prior to the commencement of this action, enter this state and do business therein, and submitted itself to the jurisdiction of the courts of this state, and on the 31st day of August, 1885, in the city of Denver, in the county of Arapahoe, and state of Colorado, enter into the written contract set out in the complaint herein and upon which this action was brought; alleges that nearly all of the machinery called for by said contract was to be manufactured by said plaintiff at said city of Denver, as was well known to said defendant when said contract was entered into, and was so manufactured; that all the moneys that were to become due and payable under said contract were to become due and
444 payable at said city of Denver, and the cause of action in said contract arose within the state of Colorado, and that the goods, wares and merchandise, alleged in the second cause of action to have been sold and delivered, were sold by plaintiff to defendant at the city of Denver, state of Colorado, and were to be paid for at said city; and that the second cause of action arose in the city of Denver, and that the accounting alleged in the third cause of action was had and said cause of action arose in said city; that as to whether or not, at the time of the commencement of this action, or since, the defendant was not or is not now doing business in said state, this defendant has not and cannot obtain sufficient knowledge or information on which to base a belief, except as hereinbefore stated, and alleges that, by reason of the matters and things done and performed in this state, in respect to which this suit is brought,

the defendant is estopped from and will not be heard to say that it was not at the time of the commencement of this action doing business in the state of Colorado, and alleges that by reason of said matters and things in respect to which this suit is brought, defendant has submitted itself to the jurisdiction of the courts of this state; and, without in any way or manner waiving any of the rights it has acquired by reason of the sheriff's return aforesaid, but insisting upon the conclusiveness of said return, alleges, on information and belief, that said Alsop was at the time of the service of summons and the complaint herein upon him a stockholder of the defendant company, and that November 13, 1886, a writ of summons was served on defendant, and this court has jurisdiction of the person of defendant; prays for judgment in accordance with prayer of complaint. Signed by Teller & Orahood, attorneys for plaintiff, and duly verified by H. M. Orahood, as attorney." On July 5, 1887, the cause was heard on appellee's motion to quash the summons or return of service, and the motion sustained, and an appeal taken to this court.

445 Teller & Orahood, for appellant. R. H. Gilmore, for appellee.

REED, C. (after stating the facts as above): The first and most important question to be determined is whether appellee could be subjected to the jurisdiction of the courts of this state. It is contended that being a foreign corporation, it had not by its acts and dealings in this state submitted itself to the jurisdiction of the state courts, and that this cause could not be here tried and determined. There are two or three axiomatic principles applicable to corporations, so well understood, and generally recognized and conceded, that no authorities are necessary in their support. They are: First, that a corporation is in law for civil purposes deemed a person, may sue and be sued, contract and be contracted with, and do all other acts which — natural person could do, *not ultra vires*. Second, being an artificial person created by and deriving all its powers from its charter, it is local in its character, cannot migrate, can only, in a state or country foreign to that of its creation, make such contracts and do such business as is permitted by the laws of the state, and under such restrictions as may be imposed by its laws. We do not think section 260 of the General Statutes of this state applicable to the case under discussion, nor that such a construction was intended or contemplated by the legislature. Corporations being, as above stated, confined in their business operations to the state from which they derive their existence, and being only allowed to exercise their functions in a foreign jurisdiction by the comity, and under the laws of that state, the intention of the section above referred to was to enable such corporations as money institutions, insurance companies and that class of corporations, perhaps not to migrate, but by means of agents to extend their business and allow such agencies to become domiciled and transact the business of the corporations under the parent office and original charter. True, in a limited and

446 technical sense, almost any business transactions, no matter how trivial, made by a corporation, whether in its own or an adjacent state,—the buying of goods by a domestic mercantile corporation in New York for the purpose of sale and business here, or any transaction of that kind,—may be deemed the doing of business in New York. A sale and delivery of goods in Wyoming or Nebraska by a domestic corporation of this state might technically be termed doing business in those states; but such accidental or incidental transactions were not, in our view, contemplated by nor within the intention of the legislature in the section under consideration. Nor in this case can the purchase of machinery to be manufactured here, transported to, set — and operated in New Mexico, nor the selling of ores mined and produced in New Mexico, and shipped here to a market be regarded as doing business in this state, as contemplated in such section.

Nor do we deem it necessary that the acts of appellee should be construed to be doing business in this state, outside of the transaction in question, to render it in this case amenable to its courts, and subject to its laws. The rule is well settled that a corporation of one state may exercise its functions in another to any extent permitted by the other. No legislative permission is necessary to allow a foreign corporation to contract for and buy machinery or supplies necessary to the transaction of its business, nor is it necessary in order to allow a foreign corporation to sell its wares or manufactures to a citizen of this state. Any corporation may sell its products to a party doing business, and if in the purchase a debt be contracted, it can proceed to collect it in our courts. A foreign corporation can, as in this instance, buy of a domestic manufacturing corporation the same as a natural person, and contract a debt for the articles so bought. In order to invoke the aid of our courts in the collection of such debt, it is necessary for a citizen of this state to show that the debtor was doing business generally in this state, but
447 that he is a debtor, that the debt is due and payable here; and the debtor, whether a natural or an artificial person, if

brought by process within the jurisdiction, is amenable to our courts. Persons, including corporations, by contracting debts in a foreign jurisdiction, will be presumed to have assented to the laws in regard to the collection of debt. It is not, as is supposed in argument, of controlling importance where or when the original contract, out of which the indebtedness grew, was perfected and became operative, whether at Denver, New Mexico or Philadelphia, where it was executed by the president of the appellee. The contract appears to have been fully executed by appellant, the work accepted, large partial payments made; all that remained was for appellee to pay the balance due,—an uncontradicted debt,—which by the proofs, and former course of dealing, was due and payable in Denver, and if not made specifically so became so by operation of law, no other place having been designated. The appellant, a citizen of this state, had a right to invoke the aid of its courts to collect his debt. A proper regard to the administration of justice, the interests of trade and commerce, and to the rights of citizens requires that the

jurisdiction of courts be sustained, and not circumscribed, except by the necessity of law. In cases of this kind for collection of debts, as was well said in Railroad Co. v. Gallahue, 12 Grat. 655, which was cited with approval in Railroad Co. v. Harris, 12 Wall. 65: "It would be a startling proposition if in all such cases citizens of Virginia, and others, should be denied all remedy in her courts for causes of action arising under contracts and acts entered into and done within her territory; and should be turned over to the courts and laws of a sister state to seek for redress." If such construction would prevail, it would in many instances work a denial of justice, and give the foreign corporation complete immunity from its contracts. That a corporation may be sued in a foreign jurisdiction is a well settled, general principle, without regard to the manner in which jurisdiction may be obtained; which is a different 448 question, and dependent upon statutes in most states.

In Bennington Iron Co. v. Rutherford, 18 N. J. Law, 158, it is said: "The existence of a foreign corporation is recognized in other states, and they have the capacity to sue and be sued out of their own states."

In Moulin v. Insurance Co., 24 N. J. Law, 244: "If they authorize their officers to transact business for them in another state, they thereby subject themselves to the jurisdiction, and become answerable to the laws, of that state." In the same case, at page 233: "By the comity universal acknowledged in the states of this Union, * * * corporations may send their officers and agents into other states — transact their business, and make contracts there; and, in some instances, the laws of the states prescribed the mode and the terms upon which they may do so. I am not prepared to say that, if they choose to avail themselves of this privilege, natural justice will be violated by subjecting their officers and agents to the service of process on behalf of the corporation they represent; on the contrary, I think natural justice requires that they shall be subject to the action of the courts of the state whose comity they thus invoke. For the purposes of being sued, they ought in such cases to be regarded as voluntarily placing themselves in the situation of citizens of that state. Any natural person who goes into another state carries along with him all his personal liabilities; and there is quite as much reason that a corporation which chooses to open an office and transact its business, or to authorize contracts to be made, in another state, should be regarded as thereby voluntarily submitting itself to the action of the laws of that state, as well in reference to the mode of commencing suits against it as to the interpretation of the contracts so made."

And in Milk Co. v. Brandenburgh, 40 N. J. Law, 112: "Since the case of Moulin v. Insurance Co., 24 N. J. Law, 222, and 449 25 N. J. Law, 57, it must be regarded as the settled law of this court that, if a corporation makes a contract in a state other than that in which it was chartered, it thereby submits itself to the jurisdiction of such foreign sovereignty so far as to be liable to suit therein in regard to that contract, when summoned according to the laws of the state." See, also, Bank v. Earle, 13 Pet. 519, and Day v. Bank, 13 Vt. 97, where the same general principles are

recognized and asserted; and the same may be said of the courts of most of the states, and that in England the same jurisdiction is asserted over foreign corporations. See *Newby v. Manufacturing Co.* L. R. 7 Q. B. 293.

The question whether Alsop, upon whom service was had, was or was not, at the time of such service, a stockholder of appellee, is not one easy of solution. It is apparent from the record that his relations with the company were such that he very shortly after the service communicated the fact to the counsel of the company; and, on the 22d of November, when the first pleading was filed, it is claimed by appellee, and admitted of record, that counsel did not know he was not a stockholder. If he had at the time of service of process parted with his stock, and severed his connection with the company, it is not easy to understand why the fact was not stated. The first intimation of the fact appears in the pleading of December 9th. The affidavits introduced to establish the premises were unsatisfactory and evasive. They show that there had been a transfer on the books, and that no stock stood in his name. But the attempt to show why, and for what purpose, it was transferred to trustees, and for what purpose the trust was created, signally failed, and casts great suspicion on the transaction. The case as made is one where a stockholder holding stock that cost over \$500 gratuitously transfers it to trustees, whose names even he does not know, for some unknown and undefined purpose, and

450 at the same time contributes \$50 in money. There is a marked discrepancy in one respect between the affidavit of Mellor, president of appellee, and the testimony of Alsop. Mellor states the stock "was transferred for value." Alsop testified that there was no consideration, and says: "There was a request in this circular that those who should transfer their stock to the trustees should make a payment of 10 cents a share for expenses, and I enclosed my check for 10 cents on five hundred shares,—\$50." In order to establish the fact pleaded, the testimony should have fairly and unequivocally shown that he had, in good faith, divested himself entirely of all ownership and interest, and severed all connection with the company. A transfer in name upon the books might be no evidence of a change of ownership. It might be collusive, or made for convenience to allow another an agent to represent it. The burden of showing that he was not a stock holder was upon appellee, and he should have established the fact affirmatively, by clear and conclusive testimony, of a change of ownership. The testimony failed to establish it. Counsel for appellant regard the question as settled by the trial court that Alsop was a stockholder; counsel for appellee regard it as having been left undetermined. We are, after reading the opinion of the trial court, in doubt as to how the question was determined in that court, but are clearly of the opinion that appellee failed in proof to establish the allegation in his plea or motion, and that Alsop must be regarded as having been a stockholder at the time of service of

process. Section 40 of the Code of Civil Procedure provides: "If the suit be against a foreign corporation, or a non-resident joint-stock company or association doing business within this state, service shall be made by delivering a copy of the writ to an agent, cashier, or secretary thereof; in the absence of such agent, cashier, treasurer, or secretary, to any stockholder." We conclude, therefore, that the contracting of the debt in question was a sufficient doing business within this state to render the corporation amenable to the courts of this state, if jurisdiction could be obtained by service of process as provided in section 40 of the Code. We cannot agree with counsel of appellee that the district courts of this state are courts of limited jurisdiction, and that their jurisdiction over foreign corporations is dependent upon the voluntary acts of such corporations in placing themselves under such jurisdiction by complying with the requirements of section 260, Gen. St. They are courts of general jurisdiction, but depending, in obtaining such jurisdiction over corporations, upon the statute in so far as the statute departs from the common law in providing in what manner service can be had. We also conclude that Alsop, at the time of service, was a stockholder, and that the service upon him brought the appellee within the jurisdiction of that court, and that the court erred in sustaining the motions or pleas in abatement of the action. We advise that the judgment be reversed, and the cause remanded.

Bissell and Richmond, CC., concur.

Per Curian: For the reasons stated in the foregoing opinion, the judgment below is reversed.

452 In the Supreme Court of Missouri, Division No. I, April Term, 1915.

And thereafter, to-wit, on April 15th, 1915, the following further proceedings were had and entered of record in said cause:

"THE GOLD ISSUE MIN. & MILL. CO., Respondent,
vs.
THE PENN. FIRE INS. CO. OF PHILA., Appellant.

Come now the said parties, by attorneys, and after arguments herein, submit this cause to the Court."

And thereafter, to-wit, on June 30th, 1915, the following further proceedings were had and entered of record in said cause:

"Now at this day a majority of the Court failing to concur in the opinion herein, it is ordered by the Court that said cause be transferred to the Court in Banc."

And thereafter, to-wit, on November 1st, 1915, the following further proceedings were had and entered of record in said cause:

In the Supreme Court of Missouri. In Banc. October Term, 1915.

"THE GOLD ISSUE MIN. & MILL. CO., Respondent,
vs.
THE PENN. FIRE INS. CO. OF PHILA., Appellant.

Come now the said parties, by attorneys, and after arguments herein submit this cause to the Court."

453 In the Supreme Court of Missouri. In Banc.

And thereafter, to-wit, on March 24th, 1916, the following further proceedings were had and entered of record in said cause:

"THE GOLD ISSUE MINING & MILLING COMPANY, Respondent,
vs.
THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
Appellant.

Appeal from the Circuit Court of Audrain County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Audrain County rendered, be in all things affirmed and stand in full force and effect and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows:

454 In the Supreme Court of Missouri, October Term, 1915. In Banc.

(No. 17298.)

THE GOLD ISSUE MINING & MILLING COMPANY, Respondent,
vs.
THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
Appellant.

Statement.

This is a suit instituted June 6th, 1911, in the Circuit Court of Audrain County, Missouri, by the plaintiff against the defendant, to recover the sum of \$2,500, alleged to be due the former under the terms of a policy of insurance dated October 5th, 1909, insuring cer-

tain property in the State of Colorado against damage and loss by fire.

A trial was had which resulted in a judgment for the plaintiff, and the defendant, in proper time and in due form appealed the cause to this Court.

We will briefly state the pleadings.

The petition was in due form, charging that the plaintiff was a corporation duly organized under the laws of Arizona; that at all the times therein stated the defendant was a foreign Insurance Company, organized under the laws of Pennsylvania, and was duly licensed under the laws of this State to carry on a general fire insurance business herein, and was at all of said times carrying on said business herein.

That the plaintiff on October 5th, 1909, was the absolute owner of the property insured, situated in the State of Colorado; 455 and that upon that date the defendant issued the policy mentioned insuring the same against loss or damage by fire for a period of one year, for a consideration of — dollars.

That on August 13th, 1910, said property was struck by lightning and destroyed and damaged to the amount of \$134,000; and that proofs of loss were duly given.

The policy was a regular standard policy, containing the usual terms and conditions.

At the September Term, 1911, of said court the defendant filed in the cause a motion to quash the summons and the return of service thereof made by the Sheriff of Cole County on the Superintendent of Insurance of this State, which was by the court overruled.

Thereupon the cause was passed to await the decision of this Court in the case of State ex rel. v. Barnett, 239 Mo. 193.

That after that case had been decided, the defendant, after leave of court, had been obtained, filed answer which is substantially as follows:

The answer alleges the service was had upon the superintendent of insurance; that the court acquired no jurisdiction over defendant because neither party was a resident of Missouri and the action accrued in Colorado, and therefore Section 7042, R. S. 1909, did not apply; that said section is unconstitutional and void, because in violation of Section 30, Article 2, of the Missouri Constitution, and Section 1, Article 14 of the Federal Constitution; also that Section 7042 was enacted in 1885, Laws of Missouri 1885, page 183, in violation of Section 28 and of Section 34, of Article 4, of the Missouri Constitution, and therefore void, so that the service of process gave no jurisdiction over the defendant.

456 That in violation of the terms of the policy the property had been permitted to remain idle more than thirty days without the written permission of the defendant, also that in violation thereof, said property had been encumbered by the execution of a mortgage thereon, to secure the sum of \$25,000 without defendant's knowledge or consent.

Further, that the item "gold in process" mentioned in the policy was not destroyed; that contrary to the terms of the policy, the prop-

erty insured was not in operation at the time of the fire nor for more than six months prior thereto; that the property was mortgaged at the time of the issuance of the policy and at the time of the fire without the consent of the defendant; and that the plaintiff was guilty of fraud and false swearing in claiming in its proofs of loss that "gold in process" to the value of \$9000.00, was destroyed; that the plaintiff was not the sole and unconditional owner of the property insured, nor did it own the property in fee simple, because it had not been licensed to do business in Colorado under the provisions of Section 904 and Section 910, R. S. Colo., 1908, and therefore it did not have title to the property, pleading decisions of Colorado to this effect; and that the defendant had tendered to the plaintiff all the premium with interest thereon.

The reply denied the unconstitutionality of Section 7042; admitted that the building was not in operation as charged by defendant, but pleaded waiver of such condition of the policy; that the mortgage on the property was paid off before the insurance was taken out; denied making false statements regarding "gold in process"; denied any information sufficient to form a belief as to whether Section 910, R. S. Colo. 1908, and cases cited by defendant were ever in force or rendered by the court; alleged that it
457 paid taxes upon the property prior to the fire; plead that the courts of Colorado had decided that after a foreign corporation has paid a license fee, it may sue in the courts of Colorado; and plead that the doctrine of waiver was the law of Colorado.

The policy in suit was dated and delivered along with the other policies, amounting to about \$50,000, to a Mr. Doepke, president of the respondent company, on or about October 5th, 1909, and covers the insured property for one year thereafter. The insured property was destroyed by fire on August 13th, 1910, and this action was instituted in the Circuit Court of Audrain County on June 6th, 1911; summons being served upon Frank Blake, superintendent of the insurance department of the State of Missouri, on June 7th, 1911.

We will first state the undisputed facts of the case; and then briefly state what the evidence tended to show regarding those that were disputed, viz:

The plaintiff herein is a corporation duly organized under the laws of the State of Arizona. The defendant is a fire insurance corporation duly organized under the laws of the State of Pennsylvania, and at all times mentioned in this suit and at the time this suit was commenced was, and ever since had been, duly licensed as a foreign insurance company to do business in the State of Missouri.

On October 5, 1909, the defendant duly made and delivered its policy and contract of insurance to plaintiff herein at Cripple Creek, Colorado, where it had a general insurance agency, which was represented by Kilpatrick and Hanley. In that section of Colorado the insurance company had no other representative, and Kilpatrick and Hanley had authority to make contracts of insurance.
458 At the time the insurance was effected plaintiff owned certain valuable mining property and was engaged in the building of a large smelter for the purpose of smelting gold from its mines,

which were located two or three miles out of Cripple Creek, Teller County, Colorado. On October 5, 1909, for and in consideration of a premium of \$74.12, defendant, through Kilpatrick and Hanley, its general agents at Cripple Creek, did issue its policy and contract of insurance to plaintiff whereby it was insured against all loss or damage by fire for a period of one year from October 5, 1909, to October 5, 1910, to the smelter, buildings, machinery, etc., which went to make up the smelter, which are described in the policy and which were owned by plaintiff, and which was finished and ready for use the day it was destroyed by lightning. Lightning struck the buildings August 13, 1910, and they were all destroyed by fire resulting therefrom. The evidence shows that the insured buildings and property, which were totally destroyed by fire, were worth \$134,000 and that the loss and damage occasioned thereby was about that sum. There was a large amount of other insurance upon the property besides that which was issued by appellant herein, amounting to about \$50,000. The insurance premiums were not paid in cash when the policies were delivered, but a credit was given to plaintiff therefor by Kilpatrick and Hanley, and prior to the fire plaintiff paid \$500 to Kilpatrick and Hanley on the premiums, which amounted to between \$1,500 and \$1,600.

August 15, 1910, two days after the fire, Kilpatrick and Hanley sent a telegram from Cripple Creek, Colorado, to J. F. W. Doepe, the president of respondent, and one who was in sole charge of respondent's business, and the only one with whom Kilpatrick and Hanley ever had any business, requesting that respondent 459 send the balance of the premiums, which amounted to \$1,124. The telegram is as follows:

"CRIPPLE CREEK, Aug. 15, 1910.
J. F. W. Doepe, Mercantile Building, St. Louis, Missouri:

"Mail draft for your protection eleven hundred and twenty-four dollars.

KILPATRICK AND HANLEY."

Immediately upon receipt of that telegram Doepe sent a draft to Kilpatrick and Hanley for said sum of \$1,124, which made payment in full of all the premiums upon all the policies, including the policy of defendant herein, which Kilpatrick and Hanley had issued upon the property in question.

At the time the insurance was effected and at the time the fire occurred the plaintiff had not received a license to do business in the State of Colorado from that State, although it had for a long time past owned the mining property in question and had been engaged in the erection of the smelter and buildings which were insured and destroyed by fire and had been regularly paying taxes to the State of Colorado upon the property in question.

After the fire the plaintiff gave due notice of the fire to defendant and made due proofs of loss through the Kilpatrick and Hanley agency, the agents of the defendant.

The policy provided that the property should not be idle for more than thirty days without the written permission of defendant. The evidence for plaintiff tended to show that at the time the policy was issued and delivered to plaintiff, its president informed the agents of defendant that because of the scarcity of fuel and the difficulty in delivering it at the plant, a tramway might have to be constructed, and on account of those matters the smelter might be idle at times for periods of more than thirty days at a time, and asked them what he should do in the premises. That in reply thereto said agents stated to him, that that would be all right; and thereupon he accepted the policies and paid the premium as previously stated. That thereafter, and before the fire occurred, the same inquiry had been addressed a number of times to said agents, to which they made substantially the same answer, as that before stated. This was corroborated by Kilpatrick one of defendant's agents and witnesses.

That when it was found out that the business would have to shut down, Doeple, the president of the plaintiff company, went to defendant's agents and informed them that he was unable to procure the necessary fuel with which to operate the smelter and would have to close down on that account, and asked them what was necessary for him to do in regard to the insurance, as he did not want any question raised as to its validity. This was on January 10th, 1910; and Kilpatrick said to him, "All right; go ahead."

That each and every month thereafter, said agents were notified of the fact that the mill was idle, and inquiry made of them as to what should be done. That at no time did they make "any objections to it." Kilpatrick, one of defendant's agents says that was true, and that he made no objection, "because I (he) expected he (Doeple) would start up in a short time, and I didn't want to lose the business and premiums."

The policy prohibited encumbrances upon the property; and at the time of the issuance of the policy or shortly thereafter, the company executed to one Peters a mortgage on the property to secure the sum of \$25,000.

The undisputed evidence shows that in "June, 1910,"
461 Doeple informed Kilpatrick and Hanley about "this mortgage" and the agents made no objection "whatever" to it. They did not, upon being informed of the existence of this mortgage, cancel the policy or offer to return any of the premiums. Under date of July 11 and 21, respectively, 1910, Kilpatrick and Hanley wrote to plaintiff and cancelled certain other policies which they had issued to it upon this property for the reason that the Peters mortgage of \$25,000 was upon the property, and in the place of the canceled policies wrote other policies to take the place of the canceled ones. On July 10, 1910, more than a month before the fire, the Peters mortgage was paid off and satisfied in full. A second mortgage on the property is mentioned in the evidence, but not set out, and the amount it was given to secure is not made clear, but whatever was the amount, it was fully paid and satisfied June 11, 1908, more than two years before the fire. The note had been "surrendered up and

canceled." The testimony in regard to both of these mortgages having been fully paid and released before the fire is proven by the uncontradicted testimony in this case.

It is conceded that the plaintiff company had not complied with the laws of Colorado, and secured a license to do business therein, at the time the policy in question was issued.

Such additional facts as may be necessary for a proper disposition of the case will be stated in the opinion.

Opinion.

I.

Counsel for the appellant (defendant) assign many grounds for a reversal of the judgment of the circuit court; a number of them are constitutional questions.

We will dispose of the latter first, because if appellant's position is sound in that regard, then there will be no necessity for a 462 determination of the former.

Counsel for appellant state their position in the following language:

"The court erred in overruling defendant's motion to quash the writ and in refusing to sustain the defense, set forth in the first paragraph of defendant's answer, which defense was based upon the grounds that the Superintendent of the Insurance Department of the State of Missouri, upon whom service was attempted to be made, was not authorized by the laws of the State of Missouri to acknowledge or receive service of process for the defendant in this action and that Sec. 7042, R. S. of Missouri, 1909, is unconstitutional and void because it denies to the defendant due process of law as guaranteed to it by the Constitution of the State of Missouri and by Sec. 1, Article XIV of the Constitution of the United States."

While counsel state their general proposition in the language just quoted, yet when they come to brief and argue the same they subdivide it, at least by necessary implication, into five propositions, which, if I correctly understand them, are as follows:

First. That said Section 7042, R. S. 1909, was only designed to provide for service of process issued in suits against foreign insurance companies doing business in this State founded upon contracts of insurance made in this State, and not elsewhere.

Second. That, if said Section 7042 was designed to authorize service of process issued in suits against foreign insurance companies doing business in this State under authority of the State properly granted, growing out of contracts of insurance made in another State of country, then it is unconstitutional, null and void under both the State and Federal Constitutions, as stated by counsel in their general proposition before quoted.

463 Third. That the legislature has no constitutional power to enact laws conferring jurisdiction upon the courts of this State to try suits against foreign insurance companies based upon contracts of insurance executed in another State or country.

Fourth. That said Section 7042 was not designed to provide for service of process issued in suits against foreign insurance companies doing business in this State unlawfully, that is, without permission of the State, founded upon contracts of insurance made in this State; but if that was the design then the section is unconstitutional for the reasons before stated.

Fifth. That, if said Section 7042 was designed to authorize service of process in suits against foreign insurance companies doing business in this State based upon a contract of insurance made in another State with or without a license from that State, then it is unconstitutional, null and void, for the reasons before stated.

Regarding the first: While this question is embraced within the general proposition before mentioned, yet in fact, it presents no constitutional question whatever, but simply involves the meaning of Section 7042.

A foreword: Because of the misapprehension, in my opinion, of counsel for appellant, and some of my learned associates regarding the meaning of section 7042, R. S. 1909 and its constitutionality under the ruling of the Supreme Court of the United States in the cases of Old Wayne Life Association v. McDonough, 204 U. S., 22, and Simon v. Southern Railway Company, 236 U. S., 115, and because of the far-reaching detrimental and injurious effect such a rule would have upon the jurisprudence of this and the other States of the Union and upon the speedy and orderly administration of justice,

I feel justified in devoting more time and space to the case
464 than would otherwise be necessary. This may, and doubtless will, lead to more or less repetition, and some illustrations to show the application of the principles of law to the facts; and consequently a prolongation of the opinion.

Returning to that statute: Every phase of this statute save its constitutionality was carefully considered and determined by this court in the case of State ex rel. v. Grimm, 239 Mo. 135, l. c. 159. Since, however, its meaning has again been questioned and its constitutionality assailed I will add some additional views as to its meaning and then carefully consider its constitutionality.

In order to grasp the real meaning of this statute we should have it before us. It reads as follows:

"Sec. 7042. Any insurance company not incorporated by or organized under the laws of this State, desiring to transact any business by any agent or agents in this state, shall first file with the Superintendent of the Insurance Department a written instrument or power of attorney, duly signed and sealed, appointing and authorizing said superintendent to acknowledge or receive service of process issued from any court of record, justice of the peace, or other inferior court, and upon whom such process may be served for and in behalf of such company, in any court of this State, and consenting that service of process upon said superintendent shall be taken and held to be as valid as if served upon the company, according to the laws of this or any other State. Service of process as aforesaid, issued by any such court, as aforesaid, upon the superintendent shall be valid and

be deemed personal service upon such company, so long as it shall have any policies or liabilities outstanding in this State.

465 * * * Every such instrument of appointment executed by such company, shall be attested by the seal of such company, and shall recite the whole of this section, and shall be accompanied by a copy of a resolution of the board of directors or trustees of such company similarly attested, showing that the president and secretary, or other chief officers of such company, are authorized to execute such instrument in behalf of the company; and if any such company shall fail, neglect or refuse to appoint and maintain, within the state, an attorney or agent, in the manner hereinbefore described, it shall forfeit the right to do or continue business in this State."

This section should be read with sections 7040 and 7041 R. S. 1909, for the former prohibits all foreign insurance companies from doing business in this state without first taking out a license, etc., and the second prescribes the mode of procuring such license, etc.

This statute was first enacted in 1845, (Laws 1845, page 110, section 3), and was carried into the Revised Statutes of 1845 as section 3, on page 610.

This statute was amended in 1885 (Laws 1885, page 183, section 1) so as to read as we now have it in said section 7042, and it was first carried into the Revised Statute of 1889, as section 5912,

On May 11, 1899, the appellant filed with the Superintendent of Insurance an instrument in the nature of a consent and appointment in compliance with the requirements of the Revised Statutes of Missouri, 1889, stating the desire of the appellant to transact business in the State of Missouri pursuant to the laws thereof, setting forth fully said Section 5912.

And thereupon and under that authority the appellant has 466 continued to the present time to transact its said business in this State under said license.

This places before us clearly the law under which the appellant came into the State to transact an insurance business, and its status before the law of the State, including its agreement for service of legal process upon it through the Insurance Commissioner of this State.

It is one of the elementary rules of statutory construction that in trying to ascertain the meaning of a statute or an amendment thereto, we should first look at the status of the subject matter of the contemplated legislation as well as the law or lack of law governing the same. If there is no law upon the subject, and some evil exists in connection therewith, which the legislature desires to remedy, then a new statute must be enacted in order to remedy the evil; but if there is an existing law governing the matter, statutory or common law, which is defective or insufficient to properly govern the same and that in consequence thereof evil lurks in or about the same, which should be abolished, then that end is generally accomplished by an enactment supplementing the deficient statute or the insufficiency of the common law, as the case may be.

Dowdy v. Wamble, 110 Mo. l. c. 283.

Mooney v. Buford & George Mfg. Co., 72 Fed. l. c. 36.

Prior to 1845 the insurance business transacted in this State, both life and fire, was comparatively small, and principally done by foreign companies. For that reason there had been but little legislation needed or enacted upon the subject; no means were provided by which service of process could be had against such a company issuing policies in this State. This lead to great injustice and hardship in many cases, because when a loss occurred the insured was compelled to settle with the company upon its own terms or go to the State of its incorporation and sue it for the sum due on the policy. This lead to much loss of time, trouble and expense on the part of the policy-holders in going to and from the place of trial, to say nothing of the cost and expense of the litigation.

467 This injustice appealed to the legislature, and in 1845, for the first time in so far as I have been able to ascertain, it undertook by legislation to remedy that injustice in so far as concerned contracts of insurance made in this State, and thereby authorized suit to be brought on such policies in the courts of this State, and provided for service of process against any such company in the manner stated therein, which will presently be copied.

As previously stated, the first legislation in this State which took any definite form looking to a remedy of the injustice and hardships mentioned, was enacted in 1845, (Laws 1845, p. 110) which is chapter 87 R. S. 1845.

468 While this entire chapter should be considered in connection herewith, as throwing light upon the general design the legislature had in mind, yet space compels me to confine my observations to section 3, page 610, R. S. 1845, thereof. It reads as follows:

"The agent or agents of any such company aforesaid, shall also be required, before commencing business, or, in case he or they have already commenced business, then, on or before the first day of July, eighteen hundred and forty-five, to furnish to the clerk of the county court, to be placed on the records of said court, a resolution of the board of directors of the company for which he or they may propose to act, or are already acting, duly authenticated, authorizing any citizen or person residing in the state of Missouri, or elsewhere, having a claim against any such company aforesaid, growing out of a contract of insurance, made with the agent or agents of any such company aforesaid, doing business in this state, to sue for the same in any court in said state having competent jurisdiction; and further authorizing service of process on said agent or agents to be sufficiently binding on said company to abide the issue of said suit; and that such service shall authorize judgments in the same manner that judgments are taken against private individuals; and it is hereby enacted, that the service of process on the said agent or agents, in any action commenced against such company, shall be deemed a service upon the company, and shall authorize the same proceedings as in case of other actions at law; the process shall be served and returned in the same manner, as if the action were against the agent

or agents personally."

In addition to what was held by this Court in the case of State ex rel. v. Grimm, 239 Mo. 135, l. c. 159 to 171, as to the meaning of section 7042, I have this to say: That section 3 of the Act of 469 1845 required all foreign insurance companies desiring to do business in this State to first place on record a resolution of the Board of Directors, "authorizing any citizen or person residing in the State of Missouri or elsewhere, having a claim against any such company aforesaid *growing out of a contract of insurance made with an agent or agents of such company aforesaid doing business in this State to sue for the same in any county in said State.*"

The italics are ours, and are made for the purpose of accentuating the fact that this original statute did, as contended for by counsel for the petitioner, provide and was designed to limit the service of process in suits against such companies growing out of contracts of insurance made by them in this State.

This statute was amended by An Act of 1855, (Laws 1855, page 885, Section 1) which also required a resolution of the Board of Directors of such foreign insurance company "authorizing any person having a claim against such company growing out of a contract of insurance made in this State with the agent or agents thereof doing business in this State to sue such company for the same in any county of this State."

This amendment also limited the service of process in suits against such company growing out of contracts of insurance made in this State.

This statute was further amended in 1865, Gen. Stat. 1865, page 402, sec. 3, by adding among other things the following: * * * "and the service of process on such agent or agents as aforesaid shall be deemed a service upon the company sued, and shall authorize the same proceedings in suit as in the case of other suits in such court," etc.

And the following amendment was added to section 6013,
470 R. S. 1879:

"Service of process as aforesaid issued by any such court, as aforesaid, upon any such attorney appointed by the company or by the superintendent, as aforesaid, shall be valid and binding and be deemed personal service upon such company so long as it shall have any policies or liabilities outstanding in this State, etc."

The latter amendment was designed to limit the time of service of process upon the company "to such time as it has policies or liabilities outstanding in this State," etc.

As time passed the insurance business grew by leaps and bounds, in proportion to the general business of the country, and policies of insurance were issued by the thousands in and out of this State by foreign corporations on property located herein and elsewhere, and in order to meet the new order of things, additional legislation was necessary.

Under this new order of things there was no provision contained in the Act of 1845 or in any of the amendments thereof prior to 1885, by which a resident or a nonresident of this State could sue a foreign

insurance company doing business herein, upon a policy of insurance issued by it out of this State, insuring property located in this State or elsewhere, and in order to meet that condition Section 3 of the Act of 1845, as amended, as previously stated, was further amended, by the Act of 1885. (Laws 1885, p. 183.)

After the various amendments mentioned had been enacted, this statute, as before stated, passed into the revision of 1889, and is section 5912, and into the revision of 1909, and is now section 7042.

Section 7042 was in full force and effect when appellant
471 applied for a license to do business in this State, and on the
11th day of May, 1899, it fully complied with the requirements of that statute, and among other things filed with the Superintendent of Insurance of the State, the instrument mentioned in said section, appointing him its agent to accept service of such process as therein provided for as might be issued against it by any court of proper authority in this State, and consented that service had upon him as such should be legal and personally binding upon it in the same manner as other proceedings had in said court.

By the amendment of 1885, which is now Section 7042 the legislature broadened and extended the scope and operation of the Act of 1845, and the various amendments thereto, by striking out the words which limited it to suits brought on contracts of insurance made in this State, and by inserting in lieu thereof, the provision requiring all such companies to appoint the Insurance Commissioner of this State as their agent to accept service of process for them and to acknowledge receipt of the same when "issued by any court of record, justice of the peace or other inferior court, and upon whom such process may be served for and in behalf of such company in all proceedings that may be instituted against such company in any court of this State or in any court of the United States in this State, and consenting that service of process upon said superintendent shall be taken and held to be as valid as if served upon the company, according to the laws of this or any other State," and that service of process as aforesaid issued by any such court as aforesaid upon the Superintendent of Insurance "shall be valid and binding and be
472 deemed personal service upon such company so long as it shall have any policies or liabilities outstanding, etc."

The omission from this statute — the limitation of the process of the courts of this state to causes of action arising out of contracts of insurance made in this State, as originally enacted, and enlarging or extending the process of the courts to "*all proceedings that might be instituted against such company in any court of this State,*" clearly authorized the Superintendent of Insurance to acknowledge the receipt and service of process for any such company in any and all transitory causes of action that might be brought by anyone against it in the courts of this State, except those mentioned in Section 7044, R. S. 1909, regardless of place where the contract of insurance was entered into; and the language of this amendment is sufficiently comprehensive to embrace residents and non-residents of the State at the time of the issuance of the policy and at the time of the institution of the suit thereon. This it seems to me is too

plain for argument, and to attempt to do so would but confuse the plain meaning of the language of the amendment of 1885, and the steadfast purpose the legislature had in mind when the amendment was enacted. Nor does the amendment of 1869, which in substance provides that the authority of the Superintendent of Insurance to acknowledge and accept service for such company shall continue "so long as it shall have any policies or liabilities outstanding in this state," militate in the least against the construction heretofore placed upon this section of the statutes, for the obvious reason that said amendment is a limitation upon the duration of the authority of the Superintendent of Insurance to act for such company, and not a limitation upon the character of suits that 473 may be brought and prosecuted in the courts of this State under such a service of process.

This Court in the case of *Dowdy v. Wamble*, 110 Mo. l. c. 283, in discussing this rule, said:

"There are few guides to construction more useful than that which directs attention to the prior condition of the law to aid in determining the full legislative meaning of any statutory change thereof."

In discussing the same question the United States Court of Appeals for the Seventh Circuit, in the case of *Mooney v. Buford et al.*, 72 Fed. l. c. 36, said:

"The earlier provisions quoted from the Indiana Code and statutes expressly limit the right to process against foreign corporations to suits arising out of transactions had in this state, and, from the mere omission of that limitation in the latter enactment, there would arise a just inference that an enlargement of jurisdiction in this particular was intended; but the broad terms employed in the Act of 1883, 'process in any suit against such company may be served,' etc., need not be helped out by inference * * *. There is no reason to be found in the context or in the course of previous legislation in the State or in considerations of policy for believing that in the enactment before us the word was intended to be used in a more restrictive sense."

I am therefore clearly of the opinion that said Section 7042 embraces the policy mentioned in this case and authorized the holders thereof to sue thereon in the Circuit Court of Audrain County.

II.

This brings us to the consideration of the constitutional 474 questions presented.

We will try to discuss these questions in the order stated, but they are so closely related and interdependent that what is said of one may necessarily apply to others; and for the purpose of preventing confusion in discussing the constitutionality of said Section 7042, it should be borne in mind that it does not apply to suits arising out of contracts of insurance written in this State, by a foreign insurance company, without a license from it to do business herein; all such suits are governed by Section 7044. *Nor do*

either of those sections authorize service of process in suits brought in the courts of this State against foreign insurance companies doing business herein without a license from the State to so do, based upon a policy of insurance issued thereby in another State or country. That question will be considered in paragraph Five of this opinion.

In discussing Sections 7042 and 7044, even though our language may be general, yet what is said of the one is not intended to apply to the suits mentioned in the other.

Regarding the first constitutional question presented, which is the second subdivision of appellant's general contention, before quoted:

In brief, counsel for appellant contend that Section 7042 is violative of Section 30 of Article II of the Constitution of Missouri and Section I of the XIV Amendment of the Constitution of the United States, because, first; it does not afford appellant due process of law, and second; because the legislature of this State has no power to authorize suits to be brought in the courts of this State for a breach of a contract of insurance not made in this State.

These two propositions are so closely and inseparably connected, we will discuss them together.

Does said Section 7042 provide for due process of law, and was the appellant served with due process of law?

The respondent answers this question in the affirmative, while the appellant answers it in the negative.

The latter bases its answer upon the authority of the dissenting opinion filed in the Grimm case, *supra*, and the opinion of the Supreme Court of the United States in the case of *Simon v. Southern Ry. Co.*, 236 U. S. 115.

By reading the dissenting opinion in the Grimm case it will be seen that it was predicated upon the idea that said section 7042 only applied to service of process in cases involving controversies growing out of insurance contracts *made in this State* with a foreign insurance company doing business herein under a license duly issued to it; and therefore service of process upon such a company, under that section of the statutes conferred no jurisdiction upon the courts of this State to try a case arising out of such a contract made in some other State or country.

This contention of the petitioner, in my opinion, is a clear misconception of the meaning of said Section 7042, and of the class of cases to which it applies.

In addition to what was said upon this question in the Grimm case I wish to say that in the light of the history of this statute, as shown by the various amendments made thereto from time to time and the evils the legislature intended thereby to remedy, no longer leaves a shadow of doubt but what it was the design of the legislature, by enacting Section 7042, to provide for process in suits involving controversies arising out of all lawful contracts of insurance issued by such companies outside of this State as well as those made in it, except those mentioned in Section 7044 and the classes of cases mentioned in the case of *Old Wayne Life*

Association v. Donough, 204 U. S. 22, which will be carefully considered later. That being unquestionably true, then if that section is constitutional, then clearly the petitioner here was served with due process of law within the meaning of the due process clauses of the State and Federal Constitutions.

The Grimm case therefore has no bearing whatever upon the constitutional questions presented.

While there is some language used in the opinion of the court in the case of Simon v. Southern Ry. Co., *supra*, which seems to lend support to the contention of counsel for the petitioner, yet when read in the light of the facts of that case and the statute the court had under consideration, both of which are totally different from those presented by this record, it does not, in my opinion, bear the construction placed upon it by counsel for the petitioner, nor is it applicable or controlling in the case at bar.

In order to get a clear comprehension of that case I will briefly state the principle facts thereof, as they appear in the statement of them, as made by that court.

In that case the petition charged that the plaintiff was a resident of Louisiana and the defendant was a Virginia railroad corporation doing business in the former State; that the plaintiff purchased a ticket from defendant, from Salem, Alabama to Meridian, Mississippi, and that while traveling over the lines of the defendant 477 in Alabama, through its negligence a collision occurred in which the plaintiff was injured. The suit was brought in the District Court for the Parish of Orleans in the State of Louisiana, and the petition alleged several items of damages aggregating something over \$13,000.

At all the times mentioned there was in force in the State of Louisiana, an act of the legislature, known as Act 54, two sections of which are as follows:

"Section 1. That it shall be the duty of every foreign corporation doing any business in this State to file in the office of the Secretary of State a written declaration setting forth and containing the place or locality of its domicile, the place or places in the State where it is doing business and the name of its agent or agents or other officers in this State upon whom process may be served."

"Section 2. Whenever any such corporation shall do any business of any nature whatever in this State without having complied with the requirements of Sec. 1 of this act, it may be sued for any legal cause of action in any Parish of the State where it may do business, and such service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served."

Having availed himself of these statutes the plaintiff had a summons issued for the defendant, directed to "the Southern Railway Company, through Hon. John T. Michel, Secretary of State of Louisiana, New Orleans," and required the defendant to answer in ten days.

The deputy sheriff on December 3rd, 1904, served the citation and petition "on the within named Southern Railway Co. in

478 the Parish of East Baton Rouge, State of Louisiana, by personal service on E. J. McGroney, Ass't Sec'y of State, Jno. T. Michel, Sec'y of State being absent at the time of service." The Assistant Secretary of State filed the citation and petition in his office.

No notice, however, was given to the defendant by the Secretary of State of the service of the citation upon him or of the fact that suit had been brought against it. It therefore made no appearance in the suit, and on January 10th, 1905, a judgment by default was entered against the defendant; and thereafter on January 20th, upon evidence introduced by the plaintiff the court rendered a judgment for him for the full amount sued for.

That On February 6th, 1905, the defendant having heard of the rendition of the judgment against it, filed a bill in the Circuit Court of the United States for the District of Louisiana, asking that Simon be perpetually enjoined from enforcing said judgment.

The bill of the Railway Company asking for the injunction charged fraud on the part of Simon in procuring the judgment.

Proceeding, that court says:

"The bill further alleged that the Southern Railway was not doing business in the State of Louisiana; that the service upon the Secretary or Assistant Secretary of State was not a citation upon the Railway Company and was null and void for the purpose of bringing it under the jurisdiction of the Civil District Court; that any judgment rendered upon such attempted 'citation' would be, if rendered without appearance of the defendant, a judgment without due

process of law, and consequently, in violation of the Constitution; that the Railway Company had never received the citation issued in the suit, nor was it advised, nor had it any knowledge of the pendency of said proceedings until after the rendition of the judgment; that the verdict of the jury having been rendered upon false testimony and without notice, it would be against good conscience to allow the judgment thereon to be enforced against the Railway Company, which has no remedy at law in the premises and has a complete meritorious defense to the claim on which the judgment is based; that by fraud and accident, unmixed with its own negligence, the Railway Company has been prevented from making such defense."

The cause was by the Circuit Court referred to a master to hear the evidence and to report his conclusions of law and facts. He found that the Railway was not doing business in Louisiana in the sense of the statute; that the judgment was not fraudulent, but was void because service upon the Assistant Secretary of State was not the "service upon the Secretary of State," required by the statute.

The circuit court found that the Railway Company was doing business in New Orleans; but ruled that the Act 54 did not provide for service on the Assistant Secretary of State, and hence that the judgment by default in the State court was void for want of jurisdiction of the person of the defendant.

The circuit court did not consider the question of fraud, but, as before stated, held that the State judgment was void because the Louisiana Statute providing for service on foreign corporations was

unconstitutional; and it entered a permanent injunction against said Simon, as prayed for in the bill. From that judgment Simon appealed the case to the Supreme Court of the United States.

Before taking up the Simon-Railway case, it should be
480 borne in mind that section 1 of the Louisiana statute before quoted was not before the Supreme Court of the United States for consideration, because the service of Simon in that case was had, if at all, upon the Railway Company, under the authority of Section 2 of that Act, and was served upon the Assistant Secretary of State instead of the Secretary, as the Act required. This is made clear and set at rest by the following language quoted from page 129 of opinion of Mr. Justice Lamar, who delivered the opinion in that case:

"The broader the ground of the decision here, the more likelihood there will be of affecting judgments held by persons not before the court. We therefore purposely refrain from passing upon either of the propositions decided in the courts below, and without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation, we put the decision here on the special fact, relied on in the court below, that in this case the cause of action arose within the State of Alabama, and the suit therefor, in the Louisiana court, was served on an agent designated by a Louisiana statute.

"Subject to exceptions, not material here, every State has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by
481 law. Mutual Reserve Ass'n v. Phelps, 190 U. S. 147; Mutual Life Ins. Co. v. Spartley, 172 U. S. 603."

After thusly stating the facts of the Simon-Railway case, copying the statute under which service of process in that case was attempted to be had, and what the court in that case did not consider or decide, we will now review what it did decide therein.

Following immediately the quotation last made from that opinion, the Supreme Court of the United States held that the second section of the Statute of Louisiana, the one under which the pretended service was had, was unconstitutional, in the following language:

"But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the State enacting the law. Otherwise, claims on contracts wherever made and suits for torts wherever committed might by virtue of such compulsory statute be drawn to the jurisdiction of any State in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra-territorial

extension of jurisdiction, by virtue of the power to make such
482 compulsory appointments, could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid

down in *Old Wayne Life Association v. McDonough*, 204 U. S. 22, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other States.

"In that case the Pennsylvania statute, as a condition of their doing business in the State, required foreign corporations to file a written stipulation agreeing 'that any legal process affecting the Company served on the Insurance Commissioner * * * shall have the same effect as if served personally on the Company within this State' (18). The Old Wayne Life Association having executed and delivered, in Indiana, a policy of insurance on the life of a citizen of Pennsylvania (20) was sued thereon in Pennsylvania. The declaration averred that the Company 'has been doing business in the State of Pennsylvania, issuing policies of life insurance to numerous and divers residents of said County and State,' and service was made on the Commissioner of Insurance. The Association made no appearance and a judgment by default was entered in Indiana. The plaintiff there introduced the record of the Pennsylvania proceedings and claimed that, under the full faith and credit clause of the Constitution, he was entitled to recover thereon in the Indiana court. There was no proof as to the Company having done any business in the State of Pennsylvania, except the legal presumption arising from the statements in the declaration as to soliciting insurance in that State. This court said:

"But even if it be assumed that the Company was engaged in some business in Pennsylvania at the time the contract in question

483 was made, it cannot be held that the Company agreed that service of process upon the Insurance Commissioner of that

Commonwealth would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania (21) * * * Conceding, then, that by going into Pennsylvania, without first complying with its statute, the defendant Association may be held to have consented to the service upon the Insurance Commissioner of process in a suit brought against it there in respect of business transacted by it in that Commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. * * * As the suit in the Pennsylvania court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice to the Insurance Commissioner, without any legal notice to the defendant Association and without its having appeared in person, or by Attorney, or by agent in the suit; and as the act of the Pennsylvania court in rendering the judgment must be deemed that of the State within the meaning of the Fourteenth Amendment, we hold that the judgment in Pennsylvania was not entitled to the faith and credit which, by the Constitution, is required to be given to the * * * judicial proceedings of the several States, and was void as wanting in due process of law."

As before stated, it should be remembered that in that case Simon purchased his ticket at and from Salem, Alabama, to Meridian, Mississippi, and that while riding on that ticket he was injured in Ala-

bama; also that service of the summons in that case was not had under the authority of the 1st Section of the Louisiana Act
484 mentioned, which authorizes service of process in such cases upon one of the company's own agents or officers in the State; but said service was had under the second section of said Act which only applies whenever any such company transacts any business in that State without having complied with the requirements of Section 1 of said Act, and then and only then, could service of process be had upon the Secretary of State. That is, service under the second section could never be had where the Railway Company had complied with the requirements of the first section of the Act, for in that case the service would have to be had under it, and not the second section; and there was not a scintilla of evidence introduced in that case which tended to show said company had not complied with the requirements of that section which of itself was sufficient to render inoperative the second section, for the obvious reason that it expressly provides whenever any such company transacts any business in that State without complying with the requirements of the first section, then service may be had under the authority of the second section. But concede that the Railway Company had complied with the requirements of the first section, then of course, in the express language of the second section it could not apply or become operative in that case, for the company had complied with the requirements of the first section.

And it should also be noted in this connection that two concurring facts had to affirmatively appear before the second section could, under its express provisions apply to that case, first; that the Railway Company had not complied with the requirements of section One, and second; that the company was doing business in that State without authority from the State to do so. There was no showing of non-

485 compliance with the former, and therefore all business shown to have been transacted in that State by the Railway Company must be presumed to have been lawful, and not unlawful, under the laws of that State, as well as that of other States. In other words, the second section was designed to provide for service upon all such corporations which were poachers or interlopers, transacting business illegally in that State. In other words, by reading the Second section of the Louisiana Act, it will be seen that it only applies to suits brought against a foreign corporation doing business in that State without authority therefrom, and therefore it could not apply to the Simon-Railway case, because that suit was based upon a tort committed, not in Louisiana, but in the State of Alabama. The mere fact, if it was a fact, of which there was no evidence either way, that the Railway Company may have been doing business illegally in Louisiana, that is, without authority from the State, could not expand the provisions of that section so as to embrace suits based upon torts committed or contracts executed in another State. Nor was the Railway Company in that case guilty of any conduct from which the law could or would presume that it had by implication consented to service upon the Secretary of State or the Assistant Secretary. Such implication can only arise from the fact that the trans-

action out of which the suit grew was transacted in the State without authority.

The second section, therefore, in the very nature of the case was only applicable to suits growing out of said illegal transactions. That must be true, for the reason that said section by express terms limits its operation to suits brought in that State growing out of such illegal operations. Let me make this point clear, for it is the differentiation between this and the Simon cases, and the one upon 486 which the members of this Court differ. The second section of the Louisiana Act was designed to afford redress in the courts of that State, to only such persons who had been induced to make contracts therein with a foreign corporation which had not complied with the requirements of the first section thereof; and consequently the process authorized to be issued and served by the second section was of necessity limited to suits growing out of said poaching contracts so made in that State; and it could not possibly apply to any contract made in any other State or country.

This is the principle upon which the cases of Mutual Reserve Association v. Phelps, 190 U. S. 147, and Mutual Life Insurance Co. v. Spratley, 172 U. S. 603, are based; and that is the reason and the sole reason upon which the learned Judge who wrote the opinion in the Simon-Railway Case used this language:

"But this power (the power to serve the Secretary of State without the consent of the company) to designate by statute the officer upon whom service in suits against foreign corporations may be made, relates to business and transactions within the jurisdiction of the State enacting the law."

This is clearly the meaning of the second section; and I am unable to see what other meaning that court or any other court could give to it.

Moreover, if the second section because of the fact that a foreign corporation illegally transacted business in Louisiana—perchance just one transaction (and the record discloses in that case it was not extensive) it may be sued in the courts thereof upon all lawful business transactions conducted in another State, as well as upon the illegal transactions conducted in that State, then why was the first section, which is general in its provisions enacted?

I respectfully submit, none whatever; and to answer the 487 question otherwise would permit the second section (which is an exception to, or more accurately speaking, is an assisting adjunct to the first, designed to cover the poaching transactions not embraced in the first) not only to control first, the principal part of the Act, but would practically repeal it and wipe it from the statutes of Louisiana; and that too, would be brought about by the illegal act of a wrongdoer.

This was the identical question that was involved in the case of Old Wayne Life Association v. McDonough, 204 U. S. 22; and the ruling of the court in that case was just as it was on the Simon-Railway case. This is made clear from the following language quoted from the former:

"But even if it be assumed that the Company was engaged in some business in Pennsylvania (which was without authority), at the time the contract in question was made, it cannot be held that the Company agreed that service of process upon the Insurance Commissioner of that Commonwealth would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania (21) * * * Conceding, then, that by going into Pennsylvania, without first complying with its statute, the defendant Association may be held to have consented to the service upon the Insurance Commissioner of process in a suit brought against it there in respect of business transacted by it in that Commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. * * * As the suit in the Pennsylvania court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice

488 to the Insurance Commissioner, without any legal notice to the defendant Association and without its having appeared in person, or by attorney, or by agent in the suit; and as the act of the Pennsylvania court in rendering the judgment must be deemed that of the State within the meaning of the Fourteenth Amendment, we hold that the judgment in Pennsylvania was not entitled to the faith and credit which, by the constitution, is required to be given to the * * * judicial proceedings of the several States, and was void as wanting in due process of law."

By the use of the words, "Conceding, then, that by going into Pennsylvania, without first complying with its statute (which made its contract illegal) the defendant Association may be held to have consented (by implication) to the service upon the Insurance Commissioner of process in a suit brought against it there in respect of business transacted by it in that Commonwealth (which was without permission of the State, and therefore illegal) such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania," the court meant to say, and did in effect say, that because of the fact that the Old Wayne Co. had previously to the time it executed and delivered the policy there in suit to the insured in the State of Indiana, it had been transacting business in Pennsylvania without authority, constituted no ground, within the meaning of the Pennsylvania statute, from which the court could presume that the company had consented by implication that the Insurance Commissioner of Pennsylvania might accept service of process in a suit based upon the policy so executed and delivered in the State of Indiana, notwithstanding the fact that such a presumption would

489 have been indulged in against the company, had that suit been based upon one of the policies mentioned, executed and delivered by it in Pennsylvania, without authority given by that State.

In that case, as in the Simon case, there was no express agreement that service might be had upon any one, yet the court stated that it might have implied consent of service in that case, had the company illegally entered said State, and there have transacted the business out of which that litigation arose in violation of its laws; but in that case it refused to indulge in such presumptions because the uncontradicted evidence showed that the transaction out of which that litigation arose was not conducted in the State in which the suit was brought and process served; and therefore held that in the very nature of the case it could not be presumed that the company by implication consented to service in the State of Pennsylvania, from the mere fact that it had illegally transacted other business therein than that out of which that litigation arose, without first complying with the laws of that State, when it affirmatively appeared that the illegal transaction sued on, and upon which the implied consent was predicated, was not conducted in Pennsylvania; but was transacted in the State of Indiana; and in the Simon case, in the State of Alabama; but neither of those suits were brought in the State where the policy was executed.

It was for this reason that the Supreme Court of the United States held in the Old Wayne and the Simon cases that such a statute, as the second section of the Louisiana Act, was unconstitutional and void, if its design was to authorize service of process upon any such company in a suit based upon other than illegal transactions conducted in the State where the suit was brought; and that was correct because that section only applies to suits based upon policies illegally issued in that State.

Suppose the service in the Simon case had been under the first section of the Louisiana Act, which provides for service upon the statutory agent of the company, (I use the words, statutory agent, in the sense that those mentioned in the first section are statutory agents as well as actual agents, in so far as service of process is concerned) then could it be seriously contended that the service in that case would not have been valid, that is, if it was doing a legitimate business there at the time? I think not. Otherwise, no suit could be brought in the courts of this, that or any other State against any foreign corporation doing business here, by anyone, resident or nonresident, upon any cause of action accruing outside of this State. That is not the law, nor never will be, as long as the immaculate flower of justice continues to bloom in the human heart.

The service in this case was had under the authority of section 7042 R. S. 1909, which corresponds to the first section of the Louisiana Act, and not under section 7044 R. S. 1909, which is substantially the same and designed to serve the same purpose as did the second section of the Louisiana Act.

Section 7044 reads:

"Additional service.—Service of summons in any action against an insurance company, not incorporated under and by virtue of

the laws of this State, and not authorized to do business in this State by the superintendent of insurance, shall, in addition to the mode prescribed in section 7042, be valid and legal and of the same force and effect as personal service on a private individual, if made by delivering a copy of the summons and complaint to any person within this state who shall solicit insurance on behalf of any such insurance corporation, or make any contract of insurance, or collect or receive any premium for insurance, or who adjusts or settles a loss or pays the same for such insurance corporation, or in any manner aids or assists in doing either."

Had this suit been brought under section 7044 instead of section 7042, then the case would have been on all fours with the Old Wayne and Simon cases, for the reason the former section only applies where the policy sued on is issued in this State by such a company without first complying with sections 1700, 1701 and 7042 of R. S. 1909.

This is based upon the express authority of Mutual Reserve Ass'n v. Phelps, 190 U. S. 147; Mutual Life Ins. Co. v. Spratley, 172 U. S. 603, and the New England Life Insurance Co. v. Woodworth, 111 U. S. 138, and the same process of reasoning used by the Supreme Court of the United States in the Old Wayne and the Simon cases, that is, the said statute only applies to poachers or interlopers who have issued policies in a State without first complying with her laws; consequently had the policy sued on been illegally issued in this State, then as the court said in the Old Wayne and Simon cases, there would have been an implied consent that service of process in a suit brought thereon in the courts of this State might have been had upon the persons specified in said Section 7044.

Since, however, it affirmatively appears that the appellant had fully complied with the requirements of said section 7042 and the policy having been issued in the State of Colorado, the case is not embraced within the provision of said section 7044, but falls squarely within the letter and spirit of section 7042, and 492 therefore removes it from the operation of the rule announced in the Old Wayne and Simon cases, and brings it completely within the principles of law laid down in the case of State ex rel. v. Grimm, 239 Mo. 135, l. c. 159 to 171.

The case of the New England Life Insurance Co. v. Woodworth, 111 U. S. 138, is directly in point here. It was an action upon a life insurance policy issued upon the life of Anne E. Woodworth, who was domiciled at the time the policy was taken out in the State of Michigan and who died at Seneca Falls, New York. She had never been domiciled in the State of Illinois and had no assets in the State of Illinois, unless the policy of insurance constituted assets. The Probate Court of Champaign County, Illinois, appointed the husband, S. E. Woodworth, Administrator of the Estate of Ann E. Woodworth, and he brought suit in the court of the State of Illinois against the New England Mutual Life Insurance Company, a corporation of the State of Massachusetts. Stephen E. Woodworth, appointed administrator, was the husband of Ann E. Woodworth

and the said Stephen E. Woodworth, since the death of his wife, has been a resident of the County of Champaign, and State of Illinois, and had possession of the policy at the time the suit was instituted. On this state of facts, the defendant requested the presiding judges to rule that the plaintiff, as administrator appointed in Illinois, could not maintain this action. The request was overruled and the case carried to the Supreme Court of the United States and that Court sustained the proceeding, though the service was upon the defendant by virtue of a statute requiring the defendant to appoint a person upon whom lawful process could be served.

In deciding the case, the Supreme Court of the United
493 States said:

"In view of this legislation and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has, by virtue of those laws, a place of business in Illinois, and a general agent there, and a resident attorney there for the service of process, and can be compelled to pay its debts there by judicial process, and has issued a policy payable, on death, to an administrator, the corporation must be regarded as having a domicile there, in the sense of the rule that the debt on the policy is assets at its domicile, so as to uphold the grant of letters of administration there. The corporation will be presumed to have been doing business in Illinois by virtue of its laws at the time the intestate died, in view of the fact that it was so doing business there when this suit was brought (as the bill of exception alleges), in the absence of any statement in the record that it was not so doing business there when the intestate died. In view of the statement of the letters, if the only personal property the intestate had was the policy, as the bill of exceptions states, it was for the corporation to show affirmatively that it was not doing business in Illinois when she died, in order to overthrow the validity of the letters, by thus showing that the policy was not assets in Illinois when she died.

"The general rule is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found, as this court has recently affirmed in *Wyman v. Halstead*, 109 U. S. 654. But the reason why the State which charters a corporation is its domicile in reference to

debts which it owes, is because there only can it be sued or
494 found for the service of process. This is now changed in cases like the present; and in the courts of the United States it is held, that a corporation of one State doing business in another is suable in the courts of the United States established in the manner provided by those laws. *Lafayette Insurance Company v. French*, 18 How. 404; *Railroad Company v. Harris*, 12 Wall. 65

Ex parte Schollenberger, 96 U. S.; Railroad Company v. Koontz, 104 U. S. 5, 10."

This cause had been cited and approved in the following cases:

- Southern Pacific Co. v. Denton, 146 U. S. 202, l. c. 207.
Shaw v. Quincy Mining Co., 145 U. S. 444, l. c. 452.
Fitzgerald Const. Co. v. Fitzgerald, 137 U. S. 98, l. c. 106.
In re Louisville Underwriters, 134 U. S. 488, l. c. 493.
In re Magid-Hope Mfg. Co., 110 Fed. l. c. 353.
Burger v. Grand Rapids & I. R. Co., 22 Fed. l. c. 563.
Kibbler v. St. Louis & S. F. R. Co., 147 l. c. 881.
Elk Garden Co. v. T. W. Thayer Co., 179 Fed. l. c. 558.
Mich. Aluminum F. Co. v. Aluminum Castings Co. 190 Fed.
l. c. 883.
Mooney v. Buford & George Mfg. Co. 72 Fed. l. c. 40.
Hazeltine v. Mississippi Val. Fire Ins. Co. 55 Fed. l. c. 745.
Overman Wheel Co. v. Pope Mfg. Co. 46 Fed. l. c. 579.
Riddle v. Ndw York, L. E. & W. R. Co., 39 Fed. l. c. 291.
Zambrino v. Galveston, H. & S. A. Ry. Co., 38 Fed. l. c. 452.

Since the opinion in the Simon-Railway case was handed down a case similar to the one at bar came before the United States District Court of New York, and it was there said:

"In Simon v. Southern Railway, 236 U. S. 115, 35 Sup. Ct. 255, the Supreme Court decided that a court of Louisiana had not acquired jurisdiction under the following facts: The defendant was a railroad company organized in another state, having none of its railroad in Louisiana; but doing some business there. The statutes of Louisiana directed all foreign corporations doing business in the state to appoint an agent on whom process should be served, and provided that if the corporation failed to make an appointment service might be made upon the Secretary of State. The Defendant not having appointed any such agent, Simon served his process on the Assistant Secretary of State in an action arising upon the tort of the defendant committed within the State of Alabama. The ground of the decision was that the implied consent of the corporation arising from its doing business in Louisiana must be limited to actions arising out of the business done within the State. The same rule was laid down in Old Wayne Life Association v. McDonough, 204 U. S. 27 Sup. Ct. 236, 51 L. Ed. 345; the action there being in Pennsylvania upon a life insurance contract executed in Indiana by an Indiana corporation.

"In Simon v. Southern Railway, supra, the court especially reserved from the decision a case such as those at bar, where a foreign corporation has complied with the State statute and appointed an agent upon which process may be served. Such a case at first blush presents an apparent contradiction. Since 1839 (Bank of Augusta *v.* Earl, 13 Pet. 519, 10 L. Ed. 274) it has been the doctrine of the Supreme Court that a foreign corporation was a fictitious entity which had no existence outside of the territory of the sovereign which created it. All its acts elsewhere must be viewed as those of an absent principal, acting through an authorized agent.

496 It resulted that personal jurisdiction could arise only when some agent had been appointed who was expressly authorized to appear or to accept service for the absent principal. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct., 354, 27 L. Ed. 222. Otherwise the foreign state must proceed in rem against the property of the corporation, or in personam against agents within its borders. In 1855 (*Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451), the court modified the extreme application of this doctrine by holding that, when a corporation did business within a foreign state which required as a *perquisite* the appointment of an agent, consent to such an appointment must be assumed from the doing of the business, and that jurisdiction in personam would be acquired just as if there had been in fact an appointment. *St. Clair v. Cox*, *supra*.

"The defendant here argues that the terms of such an implied consent cannot be supposed to be other than those which the state statute attempts to exact, and that if the implied consent is to be limited, as has now been indubitably done, the express consent must be limited in exactly the same way. Were this not true, the defendant urges, an outlaw who refused to obey the laws of the state would be in better position than a corporation which chooses to conform. The theory of implied consent dialectically requires the same limitations to be imposed upon express consents, at least in the absence of some explicit language to the contrary in the state statute."

"The plaintiffs on the other hand, urge that the express consent of a foreign corporation to the service of process upon its agent (Section 16, General Corporation Law, Section 432 Code of Civil Procedure) must be interpreted in the light of the statutes of the state giving jurisdiction to its own courts, and that in the cases at bar residents of New York may, under the New York Code, section 497 sue foreign corporations upon any cause of action whatever. While, of course, the jurisdiction of this court over the subject matter of suits depends altogether upon federal statutes, the question now is of personal jurisdiction, and that depends upon the interpretation of the consent actually given, an interpretation determined altogether by the intent of the state statutes. That intent being determined, there is no constitutional objection to a state's exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business. Intent and power uniting in the sections in question, how is it possible to confine the provision to actions arising from business done within the State?"

(*State ex rel. v. Vandiver*, 222 Mo. 230, where the opinions of the Supreme Court of the U. S. are reviewed.)

"These two arguments treated as mere bits of dialectic, lead to opposite results, each by unquestionable deduction, so far as I can see. One must be vicious, and the vice arises I think from confounding a legal fiction with a statement of fact. When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in

fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the State, but that is not equivalent to a consent; actually it might have refused to appoint, yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state quite independently of any intent.

“The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice 498 it will have such consent only as justice requires; hence it may be limited, as it has been limited in *Simon v. Southern Railway* supra and *Old Wayne Insurance Co. v. McDonough*, *supra*. The actual consent in the cases at bar has no such latitudinarian possibilities; it must be measured by the proper meaning to be attributed to the words used, and where that meaning calls for wide application, such must be given. There is no reason that I can see for imposing any limitation upon the effect of section 1780 of the New York Code, and as a result I find that the consents covered such actions as these. This does not, of course, touch the question of the jurisdiction of this court over the subject matter in either case.

“Motions denied.”

Smalik v. Philadelphia & Reading Coal & Iron Co., 222 Fed. 148.

Of course I know that the District Court has no power to overrule the United States Circuit Court of Appeals or the Supreme Court, yet the opinions of that court, when founded upon reason and authority and not in conflict with those superior tribunals, are worthy of careful consideration in trying to ascertain the meaning of the opinions of either of those great courts upon any question left in doubt by them, and for that reason I have quoted quite extensively from the case last cited.

There is another marked distinction between this case and the Old Wayne and Simon cases, and that is the statute there under consideration was only applicable to exceptional cases, as previously stated, while in the case at bar, section 7042, constitutes an important part of Article VII of Chapter 61 R. S. 1909, which contains the General Provisions applicable to all kinds of insurance transacted in

this State, including life, fire and accident, whether by a 499 domestic or a foreign company. That article places all of said foreign companies upon an equality before the law with domestic companies, including the rights to open offices, appoint agents, issue policies in every portion of the State, and to sue and be sued.

Any such foreign company which has complied with sections 7040, 7041 and 7042 R. S. 1909, for all practical purposes becomes a citizen of this State in the same sense as do domestic companies of the same character; and are considered citizens of this State and possess all of the rights, privileges and immunities that are possessed by the latter. Of course the foreign company must renew its license to do business within the State every year; but so long as that license

remains in force there is no distinction between the rights, powers, duties and obligations of the foreign and domestic corporation; and such a "corporation must be regarded as having a domicile" in this State.

New England Life Insurance Co. v. Woodworth, *supra*. And "within the contemplation of the statute relating to service of summons upon such foreign insurance companies, such companies are regarded as residing in each county of the State."

State ex rel. v. Grimm, 239 Mo. l. c. 186.

Meyer v. Ins. Co. 184 Mo. l. c. 486.

And "it must be conceded that the only mode by which a foreign insurance company can be served with process in this State is by the method provided for in said section 7042."

State ex rel. v. Grimm, 239 Mo. l. c. 180.

Baile v. Equitable Fire Ins. Co. 68 Mo. 617.

Middough v. Ry. 51 Mo. 520.

But how about section 7044 R. S. 1909, the statute of this State corresponding to the second section of the Louisiana Act, under which the service of summons in the Simons case was had?

500 This section was not dealing with the general rights, powers, duties and obligations of foreign insurance companies duly licensed to do business in this State, as section 7042 does, but was designed for a single purpose, viz: to procure service upon poaching companies issuing policies of insurance in this State without permission from her to so do.

The service provided for by this section is, therefore, confined to suits brought in the courts of this State, upon policies unlawfully issued herein; and as previously stated, does not and cannot, in the very nature of the case apply to suits brought in the courts of this State upon policies issued in another State or country, nor to policies lawfully issued in this State, provided of course, such a company is domiciled here, that is, has authority to transact business herein.

If this was not the law, then the courts of this State could never acquire jurisdiction over the person or subject matter of any suit brought in the courts hereof against any insurance, railroad, telegraph, telephone or other foreign corporation, either lawfully or unlawfully doing business in this State, upon any cause of action growing out of any transactions not negotiated in this State, notwithstanding the fact that the plaintiff might be a resident of Missouri and the transaction may have been negotiated in California or New York. In such a case the party having the cause of action would have to go to one of those States, the one in which his cause of action arose, and sue there, notwithstanding such company was lawfully domiciled in this State, with equal powers and rights of the domestic companies of like character. But in principle it is wholly immaterial whether the plaintiff is a resident or nonresident in such case,

501 if the position of counsel for the appellant is correct. But if that of counsel for the respondent is sound, and the cause of action is transitory in character, then a person owning the

same may sue any such company thereon in the courts of this State and have due process of law, regardless of the place, State or nation where the cause of action arose. Of course service in such cases would have to be had under section 7042, and not 7044; only under the latter when the cause of action arose in this State under a poaching transaction.

New England Life Association v. Woodworth, *supra*.

The King of Prussia v. Knepper, 22 Mo. 127.

Mutual Reserve Ass'n v. Phelps, 190 U. S. 147.

Mutual Life Ins. Co. v. Spratley, 172 U. S. 603.

I am, therefore, clearly of the opinion that section 7042 is not unconstitutional, for the reason assigned by counsel for appellant in the second subdivision previously stated; and their contention in that regard is ruled against them.

III.

This brings us to the Third subdivision of appellant's contentions.

In effect counsel for appellant contend therein that the legislature of this State has no constitutional power to enact laws conferring jurisdiction upon the courts of this State to try and determine suits against foreign insurance companies duly licensed and doing business in this State, based upon contracts of insurance executed in another State or country, whether the property is located in this State or not.

The contention is that such legislation would do violence to Section 30 of Article II of the Constitution of Missouri, and Section 502 1 of the XIV Amendment of the Constitution of the United States, known as the equal rights and due process clauses of those beneficent instruments.

If this contention is true, such a ruling would be no less novel than astounding. In the light of the constitutional provisions just referred to and others to be presently mentioned, and those of similar import contained in the constitutions of the various States of the Union, also in the light of the numerous other statutes of this and those States enacted in pursuance thereof, giving force and effect to them, as well as the common law governing transitory actions, coupled with innumerable decisions of the courts of last resort of the various States and those of the Supreme Court of the United States, it seems to me that the mind which discovered the pregnable point here contended for, hidden behind such a barricade of constitutional provisions, legislative enactments, common law rules and judicial decisions, possessed a keener perception for the discovery of the vulnerable points in our jurisprudence than any of the great military geniuses of the world has ever possessed for the discovery of the weak positions in the enemy's position, and was more daring and self-reliant in his attack than any of the bold knights mentioned in the Legends of the Rhine.

But before taking up the question of the power of the legislature to enact laws conferring jurisdiction upon the courts of this State to try such cases, I will briefly consider what is a transi-

tory action, and where it may be brought, both at common law and under the constitution and laws of this State and of the United States.

It is elementary that all transitory, or what are known as personal actions, may be brought by anyone capable of suing in any county, State or nation where the defendant may be found, subject, of course, to any express constitutional or valid statutory restrictions that may exist.

After treating of local actions, Mr. Boote, in the 4th Ed. of his Historical Treatise of an Action or Suit at Law, on page 96, in considering transitory actions, says:

"With respect to the Venue, it is said, that on the settling of Nisi Prius, they obliged the plaintiff to try his Action where it accrued because the Jury was to come from where the fact was committed, But while the Process was by Attachment and Distress, which could be only where the defendant's goods were, it begat a distinction between Actions; the one being called Transitory, which related to goods and chattels, and was to follow the defendant wherever he could be found; the other was called Local, because it related to lands, and the process was to be on the lands (1). These were to be laid in the County where the lands lay; but in Transitory Actions 504 the plaintiff had liberty to try his Action in the County wherein the defendant was summoned. But this came at length to be much abused, for the plaintiff would lay his Action far from the place where the Action arose, which put the defendant under a necessity of carrying his Witnesses into a County far from the place. In order to prevent this, the 6 R. 2, (2) was made, which enacts that Writs of Account, Debts, &c. should be commenced in the County where the contracts were made; for if the contracts were made in another County than contained in the Original, the Writ should abate. But this Statute (it is said) was never put in use, for it was thought the plaintiff could not then follow the defendant into another county, and it was foreseen that many other mischiefs would arise;" * * *

Blackstone announces the same rule. In Volume 3, page 294, (4th Ed.) he states the law thusly:

"In transitory actions, for injuries that might have happened anywhere, as debt, debinue, slander and the like, the plaintiff may declare in whatever county he pleases, and then the trial must be had in that county in which the declaration is laid."

Mr. Gould in the (5th Ed.) of his work on Pleading, page 103, Section 104, lays down this rule:

"In the application of this ancient rule, however, a distinction, suggested by general convenience, was soon established between things local and transitory; and consequently between local and transitory actions. In local actions. * * * But in actions transitory, the ancient rule as to the locality of actions and trials, is now, and has long been, entirely disregarded, or rather evaded, to every purpose except the mere form of laying some venue, and the power of the court, under special circumstances, to change it, i. e. to 505 change the county, on motion. In transitory actions, there-

fore, the plaintiff is at liberty to lay the venue in what county he pleases."

See also Bac. Abr. Actions Local, &c. B.; Com. Digest Pleading, S. 9; Sowp. 177; 1 Saund. 74 (n. 2) Gilb. C. H. page- 89-90.

Mr. Gould, also on page 108, Section 112 says:

"But personal actions, that is to say, actions which seek nothing more than the recovery of money, or personal chattles of any kind, are in most cases transitory, whether they sound in tort or in contract (w): Because actions of this class are, in most instances, founded on the violation of rights which, in contemplation of law, have no locality. And it will be found true, as a general position, that actions ex delicto, in which mere personality is alone recoverable, are, by the common law, transitory—except when they are founded upon, or arise out of some local subject. (x) Thus actions for injuries to the person, or to personal chattels, *trover, trespass on the case for escapes, false returns, deceit in the sale of goods, &c. are in general transitory (z); and may consequently be laid in any county, even though the cause of action arose within a foreign jurisdiction."

Citing Com. Digest, Actions, N. 12.

Coke's Littleton, 282.

Cowp. 161; 1 T. R. 571; 2 Black. Rep. 1058; 2 Chitty on Pleading, 242 (n. p.); 2 Salk. 670; 12 Mod. 408; Sayer, 54; 1 Wils. 336; 1 East, 114; Cro. Car., 444; 9 Johns, R 67, and 4 East. 162-3.

See also Browne on Actions at Law, pages 228 and 229.

The common law definitions of local and transitory actions were in full force and effect when the Constitution of the United States was adopted, and consequently, section 2 of Article IV thereof, has an important bearing upon all the common law adopted and statutes enacted by this State since that time, (as will be presently shown) which provides: "*The citizens of each State shall be entitled to all privileges and immunities of citizens of the several states.*" (Italics ours.)

And in connection with said section Two of the Constitution must be read section 1 of the XIV Amendment thereof, for the reason it relates to the same subject matter, and greatly enlarges the provisions of said Second section.

This amendment reads:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 30 of the Missouri Bill of Rights is along the same line, and reads: "That no person shall be deprived of life, liberty or property without due process of law."

So also will section 10 of Article II of the Constitution of Missouri

shed much light upon this question, especially when read in the light of Article VI of the Constitution of Missouri.

Said section 10 reads as follows:

"Courts of justice must be open.—The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay."

507 Upon the ancient common law character of personal or transitory actions, and their venue, or places where to be brought and tried, Judge Bliss in his excellent work on Code Pleading, page 413, section 284, says:

"I am not speaking of the obsolete venue. At common law the pleader must allege a place in reference to every traversable fact, and that place, wherever the fact occurred, is charged as being within the county where the cause is to be tried. The code obligation to state the facts of itself forbids a fictitious venue, and, unless the place is material, it does not become one of the facts which constitute the cause of action. But actions are still divided into local and transitory, and as to the former, the issues must be tried in the county where the cause of action has arisen.

"The several states have designated the classes of actions which require such trial, and they are usually made to conform to local actions at common law."

So I feel safe in saying that if not predicated upon and enacted in pursuance to that common law doctrine, the legislature of this State largely followed and fashioned the Code of Civil Procedure of this State closely after it, especially sections 1751 R. S. 1909, the general statute providing where suits instituted by summons shall be brought except as otherwise provided for therein.

That section of the statute reads:

"Suits by summons, where brought.—Suits instituted by summons shall, except as otherwise provided by law, be brought: First, when the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides and the defendant may be found; second, 508 when there are several defendants, and they reside in different counties, the suit may be brought in any such county; third, when there are several defendants, some residents and others non-residents of the state, suit may be brought in any county in this state in which any defendant resides; fourth, when all the defendants are non-residents of the state, suit may be brought in any county in this state; fifth, any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing and where the defendants, or one of them, may be found."

This statute, in substantially the same form in which we now find it, has been upon the statute books of this State almost from its organization.

This section of the statute, with all kindred sections which were enacted at the same time or subsequently thereto, were designed to

open the doors of the courts of this State to all persons who have valid claims against any and all persons within the jurisdiction of this State; and it was never the intention of the framers of the Constitution, State or Federal, or the legislature, to close them against justice and to shield wrong.

These and all kindred laws are designed to make effective the old maxim, *Ubi jus, ubi remedium*. In fact, that is one of the chief corner stones of all government. This appears in section 4 of the Bill of Rights, which among other things provides: "That all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that to give that security to these things is the principal office of government, and that when government does not confer this security, it fails of its chief de-
509 sign."

With these objects and those designs in view, whenever the lawmakers of the State discovered that for any deficiency in the law, exact and even justice could not be done and measured out to each and all, whether plaintiff or defendant, they have steadfastly endeavored, by enacting new laws or amending old ones, to remedy that injustice, and at the same time deprived no one of life, liberty or property without due process of law, as provided for in the State and Federal Constitutions.

Among the numerous laws so enacted by the legislature of this State for the purposes mentioned, are those providing where foreign railroad companies, telegraph companies, telephone companies, insurance companies, including life, fire and accident, doing business in this State, may be sued in the courts hereof, and how they may be served with process.

Moreover, there are many private corporations organized under the laws of other States doing business herein, and we have statutes providing where they may be sued and how served.

And in addition to the constitutional provisions and statutory enactments before mentioned governing the questions in hand, the legislature of this State, by an amendment in the year 1905, of sections 547 and 548, R. S. 1899, provided generally that whenever any cause of action has accrued under or by virtue of any of the laws of any other State or Territory, that such cause may be brought in the courts of this State by the person entitled to the proceeds of such cause of action.

Those statutes are now sections 1736 and 1737 R. S. 1909, and read as follows:

"Sec. 1736. Parties to suit when cause of action accrues
510 in another state.—Whenever a cause of action has accrued
under or by virtue of the laws of any other state or territory,
such cause of action may be brought in any of the courts of this
state, by the person or persons entitled to the proceeds of such cause
of action: Provided, such person or persons shall be authorized to
bring such action by the laws of the state or territory where the
cause of action accrued."

"Sec. 1737. When parties not authorized by laws of other states,
action to be brought by whom.—Whenever any cause of action has

accrued under or by virtue of the laws of any other state or territory, and the person or persons entitled to the benefit of such cause of action are not authorized by the laws of such state or territory to prosecute such action in his, her, or their own names, then, in every such case, such cause of action may be brought and prosecuted in any court of this state by the person or persons authorized under the laws of such state or territory to sue in such cases. Such suits may be brought and maintained by the executor, administrator, guardian, guardian ad litem, or any other person empowered by the laws of such state or territory to sue in a representative capacity."

From this reading of these two sections it will be noticed that they place no limitation whatever upon the persons who may bring such a suit, save of course, that it must be brought by the party who under the law of said State or Territory is entitled to the proceeds of said cause of action, and of course that might be either an individual or a corporation.

The clear purpose of all of our statutes when taken together was to give full force and effect to said section 10 of Article II of the Missouri Constitution, which provides that, "The court of justice

shall be opened to every person." Not a part of them. Not 511 to the citizens or residents of Missouri only, nor to the citizens of the United States only, but to all persons of the world who demand justice at the hands of our courts against any one who may be found within the jurisdiction of this State, whether resident or nonresident, individual or corporation. This is perfectly clear from the reading of that section of the Constitution which says every person may sue. Not only that, but the same section further provides that a "certain remedy (shall be) afforded for every injury to person, property or character, etc." This provision is not limited to some of the injuries that have or may be done to the person, property and character of those mentioned in the preceding clauses, but by clear and unambiguous words, includes every one of the character mentioned.

The case of the King of Prussia v. Knepper, et al. 22 Mo., 550, while not discussing all of the questions suggested regarding this section of the constitution, yet in fact it recognizes and gives full force and effect to most, if not all of them; and by the express terms of the section 1 of the XIV Amendment all the constitutional and statutory provisions of this State regarding these questions, which apply to the citizens of Missouri, are extended to all other citizens of the United States, even though said section 10 of our constitution did not include them. But in a sense, that is a moot question, for the reason as previously shown, said section 10 embraces not only the citizens of Missouri, but those of the United States also, as well as all persons of the world.

This is not a theory, but cold, stern law; and our reports and those of the Supreme Court of the United States are full of 512 cases recognizing and enforcing those laws.

Such of these legal propositions as are material to this

case will be considered at the proper place in connection with the facts they govern.

Of course, all constitutional and statutory provisions, State and Federal, are limited in their scope and operation, to those cases which the court acquires jurisdiction of by summons duly served; and if perchance, through the imperfection of the law, there should be a cause of action for which no provision is made for due process of law, then the person interested would have a loss without a remedy, an exception to the maxim, "No right without a remedy."

It was for the purpose of embracing these exceptional cases that the various amendments of the Act of 1845, were enacted, and the various new statutes mentioned were passed by the legislature; all of which, in my opinion, amply provide for due service in all cases they were designed to embrace.

I have given this brief summary of the origin, growth and history of transitory actions in England, and their importation, adoption and expansion by means of legislative enactments, which are along the lines of the State and Federal constitutional provisions before mentioned, providing a remedy for every wrong and guaranteeing equal protection to all, and preventing anyone from being deprived of life, liberty or property without due process of law, whether residents or nonresidents, corporations or individuals.

I will now address myself to the question, has the legislature of this State the constitutional authority to enact a statute conferring jurisdiction upon the courts of this State to try a case against a foreign insurance company duly licensed and doing business in this State, upon a policy issued in another State or country? The answer must be in the affirmative if not restricted by State or Federal Constitution.

Counsel for appellant answer that question in the negative, but assign no reason therefor, except the contention that the Supreme Court of the United States has so held in the Old Wayne and Simon cases, previously mentioned.

If our conclusions announced in paragraph Two of this opinion, as to the holding of those cases, are correct, then counsel for appellant have no solid basis upon which to predicate that answer. This is for the reason that if those cases do not support their contention, then the case at bar must be determined according to the rules of law governing ordinary transitory actions. That this suit is transitory in character cannot be questioned, and, therefore, according to the authority cited, a suit on the policy might have been brought in any State where the defendant might have been found.

This is not denied by counsel for appellant, but they contend that the appellant was not a resident of this State at the time this suit was instituted, except as to the business transacted herein, and that in regard to all other matters it was a nonresident.

This contention was decided against the appellant in paragraph Two of this opinion, and correctly so, we think. But concede for the sake of the argument, that the defendant was not a resident

of this State in the strict sense of that term, at the time this suit was brought, yet it voluntarily came here and was by permission of this State authorized to transact all kinds of business that a domestic company of like character could have transacted, and that it could sue and be sued in the courts of this State. The mere fact that the appellant was not, technically speaking, a resident of this State, makes no difference in my opinion, since it was found within the jurisdiction of Missouri, whose laws provide that it might be sued in the courts hereof, and prescribed ample means for service of due process of law upon it, in all transitory actions brought against it. That is all the State and Federal Constitutions require.

As previously stated, all such companies doing business in this State under authority of our laws stand precisely upon the same footing and equality with domestic companies of like character, yea, even with individuals, whether residents or nonresidents, if found within the jurisdiction of this State.

In such a case, what possible difference does it make where such a contract was made? I submit, none whatever. To illustrate, suppose an individual, a resident of New York, should execute a note in California, promising to pay another a certain sum of money, and should then come to this State and remain until the note matures; could it be seriously contended that the maker of the note could not be sued thereon in the Courts of this State, simply because the note was not made in this State and that the maker was not a resident of the State of Missouri? I apprehend not. The test in transitory actions, as laid down by all of the authorities is, does the law of the State where the defendant is found, provide first: that suit may be brought upon such a cause against any and all persons found within the jurisdiction of the State, whether residents or nonresidents thereof, and second; does the law amply provide for due process of law upon the defendant in such a case? If so, then it is wholly immaterial where the cause of action arose, 515 and what is the residence of the defendant.

Not only that, if the contention of counsel for the appellant is sound, then our general statutes, Articles III and IV of Chapter 20 R. S. 1909, prescribing the place where transitory actions must be brought in the courts of this State, against residents and nonresidents found in the jurisdiction of Missouri and how service of process may be had upon them, in so far as nonresidents are concerned, and in so far as it relates to all causes of action not originating in this State are void also. This would be true inevitably; and not only as to this State, but to every other State in the Union, because said section 1 of the XIV Amendment applies inevitably; and not only as to this State, but to every other State in and other States authorizing the property of nonresidents to be attached would be unconstitutional in all cases where the cause of action is based upon a transaction which was made in some other State or country. This would be true, because, as said by counsel for appellant, the legislature of this State has no constitutional power to draw to its jurisdiction a cause of action arising elsewhere.

The fallacy of this position is this: the legislature of this State has never attempted to draw to its jurisdiction any cause of action that it did not possess at common law. Said section 7042, in that regard, is declaratory of the common law, only changing it as to the country where suit may be brought, and prescribing the mode of service of process, which is ample, as is shown by the record in this case; the appellant was duly served and given ample time and opportunity to make its defense. Not only that, but section 1 of the XIV Amendment of the Constitution of the United States prohibits just what counsel for appellant is contending for, namely; that
516 no resident or nonresident of this State can sue a foreign insurance company in the courts of this State, although it is authorized to, and is doing business here, upon a contract of insurance executed in another State or country; yet, they admit, which is true, that such a suit may be brought against such a company on a contract executed elsewhere, in the courts of this State. If that is not true, then according to appellant's contention, it could not be sued at all, anywhere.

What difference is there in legal effect, between the two? None; both companies are of the same character; they issue the same class of contracts within and without this State; they possess the same rights and powers, and the same duties and obligations are imposed upon them; the contracts of each are transitory in character; both may sue and be sued in the same courts of this State; when plaintiffs they have the same character of process issued in their behalf and served alike for them upon the defendants; and when defendants, the same kind of summons is issued in their behalf, and served upon their respective agents, appointed by the respective companies differing only in that in the case of the domestic company the statute providing for service of process is upon certain persons who have been chosen by the company as its agents or officers to represent it in other capacities, that is, persons who are in the employ of the company, to perform its ordinary business, while in the case of the foreign company, the service is had upon a person also chosen by the company, but not in the employ of the company, but who is an officer of this State, the Superintendent of Insurance.

Again, if not conceded, it is true, nevertheless, that if an individual nonresident of this State should execute a note outside of this State it could not be sued thereon in the courts hereof, when it becomes due. Why not? Each had the right to execute the note mentioned; both were made outside of this State; both are transitory causes of action, the laws of the State provide the same courts in which such suits thereon may be brought, and provide for the same kind of process and upon whom service may be had. In the case of the individual it must be served upon him personally or upon some members of his family, if not found, etc., while in the case of the company, domestic or foreign, because of its artificial character, the service must be had upon its duly constituted agent, (whether sued at home or abroad) the Superintendent of Insurance.

Upon this state of facts, there can be no question, in my opinion,

but what said fourteenth amendment equally applies to foreign insurance companies doing business in this State under license duly issued to it, as it does to domestic companies engaged in like business, and to transactions of like character transacted by individuals; otherwise they would not enjoy the equal protection of the laws, either in suing or being sued.

If that is not the law, then a person residing or stopping in this State, or a corporation organized under the laws hereof, might execute a note for \$1,000, in the State of Illinois to a foreign insurance company doing business in this State, yet it could not sue and recover the money due thereon from the individual nor from the domestic company, for the reason that the note was not executed in this State, and for the further reason, as contended for by counsel for appellant, that this "State has no constitutional power to draw to its jurisdiction a cause of action arising elsewhere." Nor in such

518 a case could suit be brought in the Federal court; because the amount of the note would not bring the case within its jurisdiction. I think that is indisputable, (*International Textbook Co. v. Pigg*, 217 U. S., 91 and cases cited) yet if the same note had been executed by the same party or company, at the same place, to an individual instead of a foreign corporation, he could, under a long unbroken line of decisions of this Court and of the Supreme Court of the United States, have maintained the suit.

This question has been decided by the Supreme Court of the United States in the case of the *International Textbook Co. v. Pigg*, *supra*.

That court in that case cited the case of *Chambers v. Baltimore & Ohio Ry. Co.* 207 U. S. 142, l. c. 148, and quoted with approval therefrom the following language:

"This court held in *Chambers v. Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 148, that a State may, subject to the restrictions of the Federal Constitution, 'determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them.' But it also said in the same case: 'The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution.'"

While it is true the former case involved a question of interstate commerce, yet that question was but one of the two questions presented and decided; and it had but little or no bearing upon the question of the validity of the State statute, barring State courts 519 to nonresidents while they were left open to those within the jurisdiction of the State. This is clear, for the obvious reason that the interstate commerce clause of the Constitution of the United States in no "manner, shape or form" attempts to confer or define the jurisdiction of State courts; nor was any such authority necessary to

be lodged in that clause of the Constitution in order to give Congress full and complete power to regulate that subject.

The remedy for the violation of the laws of the United States including those governing interstate commerce, rests primarily with the Federal Courts, and secondarily with the State courts, which are and have ever been opened to all persons, natural and artificial, residents and nonresidents, by Section 2 of Article IV and Section 1 of the XIV Amendment of the Constitution of the United States. In other words, the commerce clause of the constitution confers the *right* upon Congress the power to regulate interstate commerce, but the remedy for the violation thereof must primarily be in the courts created by Article III of the Constitution of the United States, and supplemented by Section 1 of the XIV Amendment thereof, which guarantees to every citizen of the United States the same right and privilege to sue in the courts of this State upon all transitory causes of action on which a citizen of this State might sue, under the laws hereof. Or in other words, if, under the laws of this State, a citizen hereof may maintain a suit on a given cause of action, then under said constitutional provision, any citizen of any other State of the Union may do likewise.

520 This Court in the case of *International Textbook Co. v. Gillespie*, 229 Mo. 397, followed the rule announced by the Supreme Court of the United States in the case of *International Textbook Co. v. Pigg*, *supra*.

See also *Cement Co. v. Gas Co.* 255 Mo. 1.

Roeder v. Robertson, 202 Mo. 522.

United Shoe Machinery Co. v. Ramlose, 231 Mo. 508.

State ex rel. v. Grimm, 239 Mo. 135, l. c. 179.

All of those cases decided by this Court were instituted under section 1751 of our Practice Act, before quoted; and those decided by the Supreme Court of the United States were brought under similar statutes of other States where the suits were instituted; but that makes no difference in principle, in so far as this question is concerned, for the reason that it does not involve the question as to who may sue or be sued, or upon whom service of process may be had in such cases, for those questions were decided in paragraph Two of this opinion, but the question in hand is, where may suits on contracts, torts and other transitory actions be brought?

Of course it cannot be said, nor do any of the cases cited hold, that nonresidents can sue all persons within the jurisdiction of this State, under the section of the Practice Act before mentioned, but they do hold that if a resident of this State can sue any or all persons within the jurisdiction of this State in the courts hereof on any transitory cause of action, under that or any other statute of this State, or under the rules of the common law, then, under said section 1 of the XIV Amendment, any citizen of the United States, though residing elsewhere, whether an individual or a corporation, is guaranteed the same right to sue upon a similar cause of action in the courts 521 of this State. In other words, the effect of that section of the Constitution is to extend to all citizens of the United States,

who are residents of other States or countries, the same right to sue persons found within the jurisdiction of this State, upon the same causes of action, that is enjoyed by our citizens under the Constitution and laws of this State; or to express the same idea in different language, the Constitution and laws of this State, in the regard mentioned, were designed principally for the citizens of Missouri, and secondarily for all persons of the world, as previously stated; but be that as it may, the first section of the XIV Amendment extends all such constitutional provisions and statutory enactments of this State, of the character mentioned, to all citizens of the United States residing elsewhere.

That is the plain meaning and effect of the ruling of the Supreme Court of the United States in the cases before cited upon this question; and also of the rulings of this Court in the cases cited in connection therewith.

Therefore, if we are correct in the conclusions reached in paragraph Two of this opinion regarding that clause of section 7042, providing for process against foreign insurance companies doing business in this State and upon whom process may, or rather, must be served, and also in our conclusions just stated regarding the legal rights of citizens of the United States residing elsewhere, to sue in the courts of this State upon the same causes of action that our own citizens enjoy, then it necessarily follows that the respondent, a citizen of Arizona, had the legal right to sue appellant in the courts of this State upon the policy mentioned in the petition and evidence.

This brings us to the consideration of the fourth ground assigned by counsel for appellant in support of their general contention that section 7042 is unconstitutional.

In substance, that contention is, that said section in so far as it authorizes service of process on a suit based upon a policy of insurance issued in this State by a foreign insurance company doing business herein without authority of law, is unconstitutional, null and void under both the State and Federal Constitutions.

This contention can easily and briefly be disposed of. It is purely a moot question in this case. The policy sued on was not issued in this State, but in the State of Colorado. Therefore it was not unlawfully issued in this State, and this contention of counsel has no foundation whatever upon which to stand.

If, however, the policy had been issued in this State without authority of the State first had and obtained, then clearly the service for process could not have been had under said section 7042, for the reason that its express terms excludes service of process thereunder in suits founded upon all such policies; but service in all such cases could be had under section 7044, which was enacted for the express purpose of providing for service in suits on a policy of insurance issued in this State against a foreign company doing business herein without authority of law.

This was expressly decided by the Supreme Court of the United States in the cases of Mutual Reserve Ass'n v. Phelps, 190 U. S. 147, and Mutual Life Ins. Co. v. Spratley, 172 U. S. 603; Commercial Mutual Accident Co. v. Davis, 213 U. S. 245; and that ruling is expressly approved by the same court in the case of Simon v. Southern Ry. Co. 236 U. S. 115, l. c. 130.

523 The same result was correctly reached by the Court of Civil Appeals of Texas in the case of El Paso & South Western Ry. Co. v. Chisholm, 180 S. W. 156; but on page 159, that court undertook to state what the Supreme Court of the United States held in the Simon case, which shows that that court, like counsel for appellant here, misconceived and did not understand the ruling in the Simon case. The latter case has no application whatever to this case, as I think I have clearly shown.

My attention has just been called to the case of Fry v. Denver & R. G. Ry. Co. 226 Fed. p. 893.

In that case the opinion does not disclose the statute under which process therein was served, and for that reason sheds but little light upon the question here presented; but the language used indicates that the manner of service was wholly immaterial.

The opinion seems to proceed upon the theory that a suit cannot be maintained in a State without the transaction out of which it arose occurred in the state where the suit was brought.

The Old Wayne and Simon cases are cited in support thereof, regardless of the statute under which process was had.

If I correctly understand the opinion, then I have no hesitency in saying that the court does not understand those cases. Instead of those cases supporting the views there expressed, they hold directly to the contrary.

But in the case at bar it must be remembered that the service was had under section 7042 and not under section 7044; but had the service in this case, under the facts thereof, been had under the latter section, then clearly the appellant would not have been 524 served with due process of law, as was held and properly so, by the Supreme Court in the Simon-Railway case, *supra*. But the court in that case did not decide the moot question here presented, but expressly declined to express an opinion upon it because not properly before the court. In that case, as in this, the cause of action did not accrue in the State where the suit was brought, and therefore in neither case could the second section of the statute apply. What is here said about section 7044, is clearly obiter, but is said to dispel some of the confusion it seems to me counsel are laboring under regarding the Simon-Railway case.

V.

The fifth and last ground assigned by counsel for appellant in support of their general contention that said section 7042 is unconstitutional, is substantially as follows:

That said section 7042 is unconstitutional, because it authorizes services of process in suits brought in the courts of this State against

foreign insurance companies doing business herein unlawfully, that is, without authority first had and obtained from the State, based upon a policy of insurance issued in another State.

In support of this contention we are cited to the cases of Old Wayne Life Ass'n v. McDonough, 204 U. S. 22, and Simon v. Rail-way Co., 236 U. S. 115.

This contention may also be briefly and easily disposed of. In the first place, it may be stated generally, that neither section 7042 nor 7044 applies to the state of facts upon which counsel's contention is predicated, nor to the facts of this case. Section 7042, in express terms limits the service of the process therein mentioned to foreign insurance companies doing business in this

State under authority from the State duly granted to them; and there is no language contained in that section which remotely indicates that it applies to any such company doing business in this State without such authority. Therefore, this contention of counsel is not well founded; and the cases cited in support thereof have no application whatever to this case.

Those cases, however, will be further considered presently.

Nor does section 7044 authorize service of process in suits brought in the courts of this State against a foreign insurance company, based upon a policy issued in another State. By its express terms the process mentioned therein is limited to suits brought upon policies of insurance issued in this State by such companies without authority from the State first had and obtained.

Not only that, there is no other statute or law of this State that I am familiar with, which authorizes service of process in a suit brought in the courts of this commonwealth against a foreign insurance company not authorized to do business herein, based upon a policy issued by it in another State or country; but if there are any such, then they would clearly be unconstitutional under both the State and Federal Constitutional provisions previously mentioned.

This is precisely what was held by the Supreme Court of the United States in the Old Wayne and Simon cases.

In the Old Wayne case, the policy was issued in the State of Indiana, to a person residing in Pennsylvania and the suit based thereon was brought in the State of Pennsylvania, where the company had no authority to transact business, but had (at least presumably, as that court stated) issued some other policies in that State without authority. Upon that state of fact, the plaintiff sued the company in Pennsylvania, and had service under a statute similar in all respects to section 7042 R. S. 1909 of this State. In that case the court, in effect, held that said section of the Pennsylvania statute did not apply to policies issued in another State, without the company was lawfully doing business in Pennsylvania; and because it was not lawfully doing business in that State, and because the policy was not issued therein, the court held that the service had under that statute was void.

That ruling was clearly correct because that statute, like said section 7042 of this State, in express terms limited the service therein mentioned to suits on policies issued in that State under permission

therefrom, and did not embrace policies issued in another State.

In the Simon case the injury occurred in the State of Alabama, and the suit was brought in the State of Louisiana, and service was had under the second section of the Louisiana Act, which is similar to section 7044 of our statutes.

In that case the court ruled, and correctly so, that the service mentioned in that section was by its express terms limited to suits based upon torts committed in that State by a foreign corporation, not authorized to do business therein; and therefore the service had upon the defendant was void because the injury did not occur in Louisiana.

The court went further in both of those cases and held that if the Pennsylvania statute mentioned authorized the service had in that case, then it would have been unconstitutional.

But suppose in the Old Wayne case the company had been doing a lawful business in Pennsylvania in pursuance to its authority, and service of process had been had upon the company under the 527 same statute, then could it be said that said statute was not applicable and did not authorize the service? Certainly not; for any other answer would be in direct conflict with the plain language of the statute, and would violate section 1 of the XIV Amendment of the Constitution of the United States.

The same would have been true in the Simon case, had the Railway Company been doing business in Louisiana under permission of the State and the service had been had under the first section of the act instead of the second.

Likewise, the same rule applies to the case at bar, because the appellant was doing business in this State, under its authority, and service was had upon it under section 7042, which in express terms authorized service of process in suits brought in the courts of this State against all such companies so doing business in this State, regardless of the place where the policies are issued, as before shown.

In this class of cases there would not exist that inconvenience and hardship mentioned by the court in the Simon case, for the reason that all such companies lawfully doing business in this State are domiciled here and have their offices, agents and attorneys, just as they have in the States of their creation. Any such company can try any such case in the courts of this State with as little expense and inconvenience as they could be tried in the State of its organization or in the State where the policy was issued; but be that as it may, it has nothing whatever to do with the question of jurisdiction of the courts of this State in such cases, and the hardship and inconvenience mentioned would not be one-tenth as great upon the company as it would be upon the various policy holders, should they be compelled to go to the various States where the various 528 companies were incorporated, or to those where the policies were issued, in order to enforce their claims.

Certainly the inconvenience and hardship which might be imposed upon such a company lawfully doing business here, when required to defend suits in the courts of this State based upon a policy issued in another State, where it has its officers, agents and attorneys, would not be greater than they would be in a suit brought here

against such a company based upon a policy issued by it in this State unlawfully, where it would have no office, agent or attorney; yet the Supreme Court of the United States in the cases of Mutual Reserve Ass'n v. Phelps, *supra*, Mutual Life Ins. Co. v. Spratley and Simon v. Southern Ry. Co., *supra*, hold that the latter class of suits may be maintained in the courts of this State.

If according to those cases, such a company may be sued under section 7044 in the courts of this State on a policy unlawfully issued here, then why may it not be sued under section 7042 on a policy lawfully issued elsewhere? But as stated by the Supreme Court of the United States in the Simon case, as to inconvenience, etc., this is foreign to the question of jurisdiction.

Again: If such a company can by implication consent to the trial of such cases in the courts of this State, and agree to the impositions of such hardship and inconveniences as are incident to the necessary defense of the case, then why may not such a company consent thereto by express agreement, as the appellant has done in this case?

I am, therefore, clearly of the opinion that said section 7042 is constitutional, and that it provides for ample service of process in all cases which it was designed to embrace, one of which is the

case at bar; I am also of the opinion that appellant was duly 529 served according to the provisions of that statute, and was properly in court.

We are, therefore, of the opinion that the general contention of counsel for appellant, as well as the five subdivisions thereof, are without merit, and should be disallowed, which is accordingly done.

VI.

Counsel for appellant assign as error, the action of the trial court in permitting the witness Doeple to testify to certain conversations had between him and Kilpatrick and Hanley, the general agents of the company at Cripple Creek, prior to and at the time the policy was issued, regarding the binding force of its terms and conditions respecting incumbrances upon and the vacancy of the property; also that the court erred in permitting said Doeple to testify as to conversations had between himself and said agents after the policy had been issued, regarding the vacancy of the property, and cites scores of cases in support thereof.

We will consider these two assignments together, as the same principle of law underlies each.

While there is some conflict of authority on these questions in other States, but in so far as Colorado, Missouri and many other States are concerned, it is well settled that where the general agents of an insurance company, at the time of or subsequent to the issuance of the policy, are informed of the existence of any fact regarding the property which is violative of any of the terms or conditions thereof, and which would work a forfeiture, and assent thereto, then the company is estopped from interposing such conditions of forfeiture as a defense to a suit brought upon the 530 policy to recover the damages sustained.

It is undisputed, in this case, that the respondent, at the time the policy was issued, informed the general agents of the company that because of the scarcity of fuel and the difficulty in getting it to the smelter until a tramway could be built, would in all probability necessitate the shutting down of the smelter for periods of more than thirty days at a time, and asked said agents what effect such idleness would have upon the policy. In reply, the agents, in substance, said, that is "all right, go on." Not only that, the same matters were discussed between the same parties each and every month, from the time the policy was issued until the date of the fire, and upon each occasion the insured asks said agents what effect would the vacancy of the smelter have upon the policy; and each time they answered, that is "all right, go ahead."

Upon these undisputed facts there can be no doubt but what the appellant is estopped from interposing these forfeiture clauses as a defense in this case; a long line of authorities hold.

- Hyman v. Ins. Co., 43 Colo., 156, 94 Pac. Rep. 27.
Nixon v. Ins. Co., 2 Colo. App. 265, 30 Pac. Rep. 42.
Thompson v. Ins. Co., 169 Mo. 12.
Rissler v. Ins. Co., 150, Mo. 366.
Allis v. Ins. Co., 11 Colo. App. 264; 53 Pac. Rep. 243.
Huestess v. Ins. Co., 70 S. E. Rep. 406.
Millis v. Ins. Co., 95 Mo. App. 211.
Rudd v. Ins. Co., 120 Mo. App. 1.
Weinberger v. Ins. Co., 170 Mo. App. 266.
Combs v. Ins. Co., 43 Mo. 150.
McCullough v. Ins. Co., 113 Mo. 607.
Loeb v. Ins. Co., 99 Mo. 55.
Prentice v. Ins. Co. 77 N. Y. 487.
Hartley v. Ins. Co., 98 N. W. R. 198, 33 Ins. L. J. 329, 91 Minn. 382.
May v. Ins. Co., 43 S. W. Rep. 73.
Trustees St. Clair Academy v. Ins. Co., 73 N. W. Rep. 768, 98 Wis. 257.
Mahone v. Ins. Co., 21 Wall. 152.
McCullom v. Ins. Co., 67 Mo. App. 80.
Harness v. Ins. Co., 76 Mo. App. 410.
Grandy v. Ins. Co., 29 S. E. Rep. 655.
Hart v. Ins. Co., 149 Ill. 513, 36 N. E. Rep. 992.
Trust Co. v. Ins. Co., 79 Mo. App. 369.
Tucker v. Ass'n, 157 Ill. 194.
Gibson v. Ins. Co., 53 Ark. 494, 14 S. W. Rep. 672.
Dowdall v. Ins. Co., 159 Ill. 179.
Pechner v. Ins. Co., 65 N. Y. 195.
Frye v. Equitable Society, 89 Atl. Rep. 57.
Wilson v. Ins. Co., 91 Atl. Rep. 913.
Stanley v. Ins. Co., 82 S. E. Rep. 826.
Clay v. Ins. Co., 25 S. E. Rep. 417.
Blass v. Ins. Co., 46 N. Y. Supp. 392.
Prendergast v. Ins. Co., 67 Mo. App. 426.
Wich v. Ins. Co., 2 Colo. App. 488.

- Smith v. Ins. Co. 3 Colo. 422.
Taylor v. Ins. Co., 14 Colo. 499, 24 Pac. Rep. 333.
Strauss v. Ins. Co. 42 Pac. Rep. 822.
Donlon v. Ins. Co., 16 Colo. App. 416, 66 Pac. Rep. 249.
Kitterring v. Ass'n, 22 Colo. 257, 44 Pac. Rep. 595.
Strauss v. Ins. Co., 9 Colo. App. 386, 48 Pac. Rep. 822.

532 Also under the facts of this case, the authorities hold that Kilpatrick and Hanley were the alter ego of the insurance company, and their knowledge of the fact that the smelter was shut down and their assurances to Doepleke that it was "all right" is a waiver.

- Thompson v. Ins. Co. 169 Mo. 25, and cases there cited.
Rissler v. Ins. Co. 150 Mo. 368.
Shutts v. Ins. Co. 159 Mo. App. 441.
Prentice v. Ins. Co. 77 N. Y. 487.
Wooldridge v. Ins. Co., 69 Mo. App. 413.
Hyman v. Ins. Co., 42 Colo. 156, 94 Pac. Rep. 27.
Crouse v. Ins. Co., 79 Mich. 249.
Andrus v. Ins. Co., 91 Minn. 358.
Hart v. Ins. Co., 9 Wash. 620.
Haight v. Ins. Co., 92 U. S. 51.
Burnham v. Ins. Co., 63 Mo. App. 85.
Montgomery v. Ins. Co., 80 Mo. App. 500.
Ross Langford v. Ins. Co., 97 Mo. App. 79.

A waiver may be inferred from the acts and conduct of the agents of the insurance company and need not be proved by express agreement. When Doepleke informed Kilpatrick, the agent of the insurance company who wrote this policy, that the mill was shut down, even though Kilpatrick had not assured him that everything was "all right," yet if he expressed no dissent, such conduct on his part would be a waiver. At least, it would be such conduct as would send the question of waiver to the jury.

- Dowdall v. Ins. Co., 159 Ill. 179, 42 N. E. Rep. 606.
Bowen v. Ins. Co., 69 Mo. App. 272.
Millis v. Ins. Co., 95 Mo. App. 217.
Appel v. Ins. Co., 132 N. Y. Supp. 200.
533 Hatcher v. Ins. Co. 127 Pac. Rep. 588.
Fahrenkurg v. Ins. Co., 68 Ill. 463.
Johnson v. Ins. Co., 42 Ill. App. 73.
Draper v. Ins. Co., 190 N. Y. 12, 82 N. E. Rep. 755.
Loeb v. Ins. Co., 99 Mo. 58.
Coppoletti v. Ins. Co., 143 N. W. Rep. 787.
Bank v. Ins. Co., 109 Mo. App. 660.
St. John v. Ins. Co., 107 Mo. App. 700.
Lewis v. Ins. Co., 187 U. S. 353.
Norton v. Ins. Co., 96 U. S. 234.

A policy of insurance is not void by reason of the plant being shut down, but only voidable, and the insurance company must cancel

and return unearned premium. Not having done so, policy continues in force.

- Patterson v. Ins. Co., 160 S. W. Rep. 59, 176 Mo. App. 37.
Flannigan v. Ins. Co., 46 N. Y. Supp. 687.
Springfield Co. v. Ins. Co., 151 Mo. 98.
Miller v. Ins. Co., 106 Mo. App. 211.
Anthony v. Ins. Co., 48 Mo. App. 73.
Brix v. Ins. Co., 171 Mo. App. 518, 153 S. W. Rep. 789.
Ashley v. Ins. Co., 102 N. E. Rep. 45, Ind.
Smith v. Ins. Co., 3 Colo. 422.
Prentice v. Ins. Co., 77 N. Y. 488.
Koehler v. Ins. Co., 168 Ill. 293.
Catlin v. Ins. Co., 163 Ill. 256, 45 N. E. Rep. 255.
Johnson v. Ins. Co., 42 Ill. App. 76.
Born v. Ins. Co., 110 Ia. 379, 81 N. W. Rep. 676.
Cassimus v. Ins. Co., 33 So. Rep. 163, 135 Ala. 256.
Viele v. Ins. Co., 26 Ia. 9.
Kutson v. Ins. Co., 72 Pac. Rep. 526, 67 Kan. 71.
534 Schreiber v. Ins. Co. 43 Minn. 367.
McCullom v. Ins. Co., 61 Mo. App. 354.
Saville v. Ins. Co., 8 Mont. 419, 20 Pac. Rep. 646.
New v. Ins. Co., 31 N. E. Rep. 475.
Jones v. Ins. Co. 92 N. E. Rep. 879.
Weinberger v. Ins. Co., 170 Mo. App. 266.
McEntyre v. Ins. Co., 131 Mo. App. 93.
Johnson v. Ins. Co., 32 N. E. Rep. 429, 143 Ill. 106.
Richmond Mica Company v. Ins. Co., 46 S. E. Rep. 464, 102
Va. 429.
Rissler v. Ins. Co. 150 Mo. 368.

After the fire occurred the agents of the company demanded the balance of the unpaid premiums from the assured, which it paid; and the law is that the acceptance of the premium after fire is a waiver of any violation of policy after the agent of the insurance company knew of it.

- Flannigan v. Ins. Co., 46 N. Y. Supp. 687.
Raddin v. Ins. Co., 120 U. S. 195.
Baker v. Ins. Co. 77 Fed. Rep. 550.
Ins. Co. v. Wolff, 95 U. S. 326.
Freeman v. Ins. Co., 47 S. W. Rep. 1025.

We are, therefore, of the opinion that under the great weight of authority, under the facts of this case, the appellant has waived the forfeiting conditions of the policy, and is estopped from interposing them as a defense to this case.

VII.

What is said regarding the vacancy clause of the policy is applicable to and controlling as to the incumbrance clause of the policy.

The agents of the appellant not only knew of the mortgages

535 being upon the property, but canceled two other policies they had issued on it because of those incumbrances, and issued two others in their stead.

This company should not be permitted to thus blow hot and cold. If it wished to rely upon these forfeiting clauses of the policy, it should have returned the unearned premiums and declared the policy void before the fire occurred; but having failed to do either, it will not, at this late date, be heard to say that the policy was void because of the violations of said forfeiting clauses.

VIII.

It is next insisted by counsel for appellant that its agents, Kilpatrick and Hanley, were acting in collusion with the respondent and against the interest of the appellant.

Counsel do not make it clear as to when or how this conspiracy was formed, or the purpose they intended to accomplish by it. Certainly they did not enter into a conspiracy to burn the smelter by a stroke of lightning from heaven; nor did the vacancy of the smelter or the incumbrances thereon contribute or operate as conductors of the lightning from the clouds to the smelter, nor were inducing causes of the lightning striking the same.

Moreover, the undisputed evidence is that the mortgages were paid and satisfied long before the fire occurred. So I am unable to see in what possible way the vacancy of the smelter and the satisfied incumbrances thereon had to do with the fire, or how the alleged conspirators could have cooperated with the lightning in destroying the smelter. Such a thing is preposterous.

The agents of the company did nothing, but tell the true facts of the case as disclosed by the physical facts and the undisputed evidence in the case. If an agent may not do that, even though it may be detrimental to the interest of his principal, then the time has come when such agencies should be abolished.

There is not a scintilla of evidence in this case that tends to show that Kilpatrick and Hanley were acting collusively against the appellant.

IX.

Counsel for appellant complain of the action of the trial court in refusing to give their instructions numbered Three, Four and Five, as asked, and in modifying them and giving them in the modified form.

Counsel say that, "By its modification of these instructions, the court told the jury that they could not find for the defendant on the question of waiver unless they believed from the evidence that 'Doepke for the plaintiff company agreed and consented that said agents Kilpatrick and Hanley should conceal from the defendant company' the facts constituting the breaches of the conditions of the policy."

These instructions should not have been given at all, either as asked by counsel or as modified by the court, for the reason that there was no evidence upon which to base them.

We disposed of this question in paragraphs Six and Seven of the opinion, and no good purpose would be served by discussing it further at this place.

It is finally insisted by counsel for appellant that,

"The court erred in giving Plaintiff's Instruction 6 and thereby instructing the jury in effect that if they found from the evidence that, prior to the institution of this suit, plaintiff paid all 537 necessary corporation fees to the State of Colorado and obtained from the Secretary of State of Colorado a certificate of authority to do business in the said states, the fact that plaintiff had not paid said fees and obtained said certificate of authority prior to its alleged acquisition of title to the property in question, or prior to the issuance of the policy in suit, or prior to the fire, was immaterial."

The evidence discloses the fact that at the time the policy in suit was issued, the respondent had not taken out a license to do business in the State of Colorado; and had not done so at the time it purchased the property upon which the buildings insured stood, for which it paid about \$175,000, and received a general warranty deed thereto; but subsequently thereto, it took out a license to do business in the State, and paid all fees and taxes due on the property, long before the fire occurred.

That instruction correctly declared the law.

This question has been passed upon by the Supreme Court of Colorado and by the Supreme Court of the United States in a case which went up from Colorado.

In the case of Allis v. Ins. Co. 11 Colo. 264, the court said:

"There is no provision that the contracts of a corporation which has failed in compliance with the law shall be void; on the contrary, their validity is recognized and they are enforceable not only against it, but against its officers, agents and stockholders. Nor does the statute assume to deprive it of any remedy which it would otherwise have upon its contracts or for the protection of its property rights. No consequence is attached to the failure except the subjecting of its officers, agents and stockholders to a personal

liability on its contracts, and the courts cannot very well 538 go further than the Legislature has gone. We feel entirely safe in saying that there is nothing in the statute by which the plaintiff's capacity to sue or its right to maintain its action to enforce its demand is in any way affected."

The following cases are cited.

Utley v. Mining Co., 4 Colo. 369.

Taylor v. Mining Co., 11 Colo. 419, 18 Pac. Rep. 537.

Kindle v. Lithographing Co., 10 Colo. 310, 13 Pac. Rep. 538.

In the case of Kindle v. Beck Co., 19 Colo. 31, 35 Pac. Rep. 538, the Supreme Court of Colorado expressly holds:

"Failure of a foreign corporation doing business in Colorado to file a certificate, as required by the Constitution, Article 15, Section 10 * * * subjects its officers, agents and stockholders to certain personal liabilities, but does not affect its right of action against a resident of the State for goods sold and delivered."

This same question came before the Supreme Court of the United States in the case of Fritts v. Palmer, 132 U. S. 282. This case arose under the laws of Colorado. In that case, the court said, "the Constitution of Colorado provided that no foreign corporation should do business in the State without having a known place of business in the State and an agent upon whom process might be served." Said act further provided that no corporation, foreign or domestic, should purchase or hold real estate except as provided in the act. The act did not indicate a mode by which a foreign corporation might acquire real estate in Colorado.

A foreign non-complying corporation took a deed to property and its title was attacked on the ground "that the company violated the laws of the State (Colorado) when it purchased the property without having previously designated its place of business and an agent."

The United States Supreme Court held that the grantee held a good title to the property, inasmuch "as the Constitution and laws of Colorado did not prohibit foreign corporations from purchasing and holding real estate within its limits," and that no one could question the title but the sovereignty.

In Seymour v. Mines, 153 U. S., it is held:

"The State only can challenge the right of a foreign corporation to hold real estate within its limits."

In Smith v. Shieley, 12 Wallace, 358, it is held:

"A deed to land is not a nullity by the grantor who has received a consideration for the grant, there being no ouster of grant at the instance of the Government."

In Summet v. Realty Co., 208 Mo. 513, this Court said:

"This court is next asked to reverse the judgment in this case because the record discloses that the insurance company held the land in question for a period of more than six years, which is in violation of Section 7 of Article XII of the Constitution of 1875. This question can be raised by the State alone. It is a matter which does not concern the individual, as held in the following cases."

See cases there cited.

In Bank v. Matthews, 98 U. S. 628, the Court said:

"A private person cannot, directly or indirectly, usurp the functions of the Government and question such title."

Bank v. Whitney, 103 U. S. 101.

Hyman v. Ins. Co., 4 Colo. 156, 94 Pac. Rep. 27.

540 It is expressly held by the Supreme Court of Colorado:
"Where a foreign corporation actually complies with the

act of April 6, 1901 (Laws 1901, p. 116, c. 52), prescribing the terms on which a foreign corporation may do business within the State and prohibiting the exercise of corporate powers or the prosecution or the defense of actions until the required fee shall have been paid and the prescribed certificate obtained subsequent to the commencement of an action on a contract made with a domestic corporation, it may maintain the action and enforce the contract, the prohibition being only provisional, subject to removal at any time." International Trust Co. vs. Leschen & Sons Rope Co. 92 Pac. 727, 5th syllabus.

The statute in question, and the contract of purchase of the land mentioned, being products of the State of Colorado, and her courts holding that under that statute said contract was valid, it would be presumption on the part of this Court to hold otherwise, especially when this Court has repeatedly ruled the same way in cases arising under similar statutes of this State.

There are some other minor points discussed, but they in no manner effect the merits of the case, and I will therefore pass them by.

Finding no error in the record, the judgment is affirmed.

Faris, J. concurs in result. Blair & Revelle, JJ. concur and Graves, Bond and Walker, JJ. dissent in a separate opinion by Graves, J.

A. M. WOODSON, C. J.

541 In the Supreme Court of Missouri. In Banc. October Term, 1915.

No. 17298.

THE GOLD ISSUE MINING AND MILLING COMPANY, Respondent,
vs.
THE PENNSYLVANIA INSURANCE COMPANY OF PHILADELPHIA,
Appellant.

Dissenting Opinion.

I cannot concur in the majority opinion. The facts of the case and the questions raised are as follows.

Plaintiff is alleged to be an Arizona corporation, and defendant is alleged to be Pennsylvania corporation, doing a general fire insurance business. The petition is an ordinary petition upon a fire insurance policy, issued by defendant to plaintiff in the state of Colorado. The property is alleged to have been destroyed by fire during the life of the policy.

This suit was brought in Audrain County, Missouri and there tried, resulting in a judgment for the plaintiff in the sum of \$2,689.57, the amount of the policy for \$2,500.00 and interest thereon. Service of summons in the case was had by the sheriff of Cole county, Missouri, delivering a copy of the petition and summons

to Frank Blake, the then Superintendent of the Insurance Department of Missouri.

Preserved in the bill of exceptions by the plaintiff, we have the motion to quash the service in this cause, which motion reads:

"Now comes the defendant herein and appearing for the purposes of this motion and for the purposes of this motion only, moves to quash the writ herein issued and the return thereon by the Sheriff of Cole County and dismissed the cause for the following reasons, to-wit:

542 "The circuit court of Audrain County and no other court of the state of Missouri has jurisdiction over the person of the defendant herein nor over the subject matter of said action.

The plaintiff is a corporation existing under the laws of the territory of Arizona but attempting to engage in business in the state of Colorado and also attempting, according to the allegations of the petition herein filed, to exercise its corporate powers in the state of Colorado; and according to the allegations of plaintiff's petition, was the owner of the property in said petition described in the state of Colorado; and the defendant is a foreign corporation of the state of Pennsylvania doing business as an insurance company in the state of Missouri and also in the state of Colorado; That the alleged contract sued upon by plaintiff was made in the state of Colorado, and the insurance against fire by said alleged policy was against loss of property located in the state of Colorado; and said fire by which said property is alleged to have been destroyed took place in the state of Colorado. Hence, the alleged contract sued upon and the alleged cause of action in plaintiff's petition, if any, is a contract under the laws of Colorado and the cause of action arose in the state of Colorado and is located in the state of Colorado:

That the defendant corporation is an insurance company of the state of Pennsylvania, and hence is a resident and a citizen of the state of Pennsylvania:

That the said contract and said cause of action is located in the state of Colorado and is not a contract nor a cause of action in the state of Missouri: That under and by virtue of Section 7042 of the Revised Statute of Missouri, 1909, a foreign insurance company is required upon condition of doing business in the state of Missouri to make the superintendent of the insurance department of the state of Missouri its agent upon whom service of process issuing out of the courts of the state of Missouri might be had; but said superintendent of insurance is and can be an agent for the purpose of service

543 of process upon only for the benefit of the state of Missouri and a cause of action arising in the state of Missouri out of contracts made in the state of Missouri; and said section is solely for the benefit of actions located in the courts of the state of Missouri; and said superintendent of insurance is not an agent for the purpose of having process served upon him for a cause of action arising outside of the state of Missouri and in behalf of non-residents of the state of Missouri; and the said Frank Blake, the said Superintendent of the Insurance Department of the State of Missouri, upon whom service was had in said action, is not an agent for this defendant upon

whom process could be served in the alleged cause of action set forth in plaintiff's petition.

Wherefore, this defendant says that this court has not jurisdiction over the subject of this action nor over the person of this defendant.

II.

The bringing of this action in the state of Missouri and outside of the state of Colorado is an attempt on the part of the plaintiff to make use of the courts of the state of Missouri to deprive the defendant of judicial process by which it may procure the attendance of witnesses on its behalf in a defense of the merits of said cause of action ; that this defendant is entitled to a defense on the merits of said cause of action and has a defense thereto consisting as follows: First, said policy is void ; second, said policy became void by reason of acts of the defendant after the issue of said policy ; third, it is void in fact and in law ; fourth, the defendant was not the sole and unconditional owner of said property described in said petition at the time of the issuing of said policy, neither was it the sole and unconditional owner thereof at the time of the alleged fire ; and further the plaintiff has avoided said policy and caused the same to become null and void by its violation of the terms of said policy, and said plaintiff did not have destroyed by fire a portion of the property as alleged in its said petition :

544 That said petition presents many issues which the defendant acting on its own behalf will be compelled to defend against, and there is a large amount of testimony in the way of witnesses and in the way of documentary evidence, all located in the state of Colorado, which this defendant cannot produce in any court of the state of Missouri by judicial process, and for that reason this court should not take jurisdiction of said cause and cannot have jurisdiction of said cause ; and to be allowed to maintain said action in the state of Missouri would be to deprive the defendant of that due process of law which the Constitution of the State of Missouri guarantees to every foreign insurance company entering the state for the purpose of doing business therein ; and to allow said action to be prosecuted in the state of Missouri is to deny to the defendant the equal protection of the laws, and is, therefore, in disobedience of Section 1 of Article XIV of the Constitution of the United States which provides that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

This motion the court nisi overruled, and the defendant answered. In this answer the jurisdiction is thus challenged:

"The defendant herein admits that at all dates herein the plaintiff was and now is, a corporation duly organized and existing under and pursuant to the laws of Arizona and that at all of said times, such defendant was and now is a foreign corporation duly existing under the laws of the State of Pennsylvania and at all of said times, said defendant as such company and corporation has been and now is engaged in a general fire insurance business in the State of Colorado

and also in the State of Missouri and was and now is licensed and authorized to do business in both of said states. Defendant says that the policy or contract of insurance issued was made and executed in the State of Colorado upon property located in the State of Colorado and further says that therefore said contract of insurance is a contract under the laws of the State of Colorado and not a contract under the laws of the State of Missouri.

545 That the said Frank Blake, Superintendent of the Insurance Department of the State of Missouri, upon whom service was had in said cause, was not authorized by the laws of the State of Missouri to acknowledge or receive service of process issued from any court of record in the State of Missouri for this defendant in said cause of action, hence this court has no jurisdiction over this defendant nor the subject matter of this action, and Section 7042, Revised Statutes of Mo. 1909, does not apply to this action for the reason that said contract of insurance is a contract of the State of Colorado and not of the State of Missouri and the cause of action can only be maintained in the State of Colorado and said Section 7042 of the Revised Statutes of Missouri is unconstitutional and void because it denies to this defendant due process of law and in an effort to take the property of this defendant without due process of law and is therefore in conflict with Section 30 of Article II, of the Constitution of the State of Missouri, which provides that no person shall be deprived of property without due process of law and is in conflict with Section I, Article XIV of the Constitution of the United States, which provides that no State shall make or enforce any law which shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Defendant further says that said Section 7042 was enacted by the General Assembly of the State of Missouri in the year 1885, as shown by Laws of Missouri, 1885, page 183, and that the title to said act is as follows:

"An act to Amend Section 6013, Article 4, of the Revised Statutes of Missouri of 1879, entitled, 'General Provisions' relating to Insurance and Service of Legal Process therein."

Whereas in truth and in fact, said act of the Legislature did not amend said Section 6013 but repealed said section and enacted a new section in lieu thereof and is therefore in conflict with Section 28, Article IV of the Constitution of Missouri which provides that no bill shall contain more than one subject which shall be clearly expressed in said title is contrary to the body of said act and that the subject of the body of the act is not expressed in the title either clearly or otherwise.

And defendant further says that said act is contrary to the terms of Section 34 of Article IV of the Constitution of Missouri which provides that:

"No act shall be amended by providing that designated words thereof be stricken out of that designated words be inserted, or that designated words be stricken out, and others inserted in lieu thereof; but the words to be stricken out or the words to be inserted, or the

words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended."

Wherefore, defendant says that said Section 7042, Revised Statutes of Missouri, 1909, is unconstitutional and void and that the service herein is void and this court has no jurisdiction over the defendant or over the subject matter of this action, and to entertain further jurisdiction in this cause, would be to deprive the defendant of its property without due process of law."

Further parts of the answer set out various defenses to the suit upon the policy, which matters can be best stated, if necessary, with the points made. Reply placed in issue matters in the answer.

547

I.

In this dissent I — not unmindful of the ruling of this court in State ex rel. vs. Grimm 239 M. 135, and cases following it. I take it that the U. S. Supreme Court has fully sustained the dissent in Grimm case, and no specious argument can change the force and effect of the very recent holding of such court. This however we discuss later.

It is clear in this case that the defendant did nothing more to give the circuit court of Audrain County jurisdiction over its person than the filing of the two documents we have set out in the statement. One is called a motion to quash the service, and the other is the answer. It is clear that jurisdiction over the person was challenged from start to finish. Jurisdiction over the person is the proper subject matter of a plea in the answer. Section 1804 R. S. 1909 reads:

"When any of the matters enumerated in section 1800 do not appear upon the face of the petition, the objection may be taken by answer. If so such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject-matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action."

Sec. 1800 R. S. 1909 referred to in Sec. 1804, supra reads:

"The defendant may demur to the petition, when it shall appear upon the face thereof, either: First, that the court has no jurisdiction of the person of the defendant, or the subject of the action; or, second, that the plaintiff has not legal capacity to sue; or, third, that there is another action pending between the same parties, for the same cause, in this state; or fourth, that there is a defect of parties plaintiff or defendant; or, fifth, that several causes of action 548 have been improperly united; or sixth, that the petition does not state facts sufficient to constitute a cause of action; or seventh, that a party plaintiff or defendant is not a necessary party to a complete determination of the action."

From this it appears that jurisdiction over the person is a subject matter of demurrer, if it appears from the face of the petition, but if it does not so appear, then it is a subject matter of answer, and is only waived in the event it is not challenged by one or the other

methods. The challenge in this case was not only timely, but continuous. Jurisdiction over the person can only be acquired by service of the person had according to law, or by consent, expressed or implied. Implied consent consists in doing such things as would indicate a willingness for the court to try the case—i. e. as filing answer or doing some similar thing, without questioning the jurisdiction of the court. Implied consent is more frequently denominated waiver of jurisdiction. In the case at bar the defendant has waived nothing as to jurisdiction. Dragged into court by the ears, as it were, it has persistently protected want of jurisdiction. It has lodged the plea where the statutes of this state say it may be lodged i. e. in its answer. The reply of the plaintiff filed herein admits all the facts necessary to show want of jurisdiction, if our views of the law are correct. In other words the reply admits that plaintiff is an Arizona corporation, and the defendant is a Pennsylvania corporation, and that "the contract of insurance was made and executed in Colorado, upon property in Colorado." This admission shows that it was not the result of business done in Missouri. The full effect of this omission is not in the petition and therefore demurrer was not necessarily the pleading for defendant. Under the plea to the jurisdiction found in the answer, and the admission found in the reply, the circuit court of Audrain County should have found for defendant upon the issue of jurisdiction.

Our statute, Sec. 7042, R. S. requires a foreign insurance company to designate the state Superintendent of Insurance as its agent to receive service of process in suits filed against such foreign 549 insurance company in the courts of this state. This designation is a pre-requisite to a license to do business in this state. A close reading of our statute however, will disclose no legislative intent to make service of process in this manner effective in any case except one arising through contracts made and acts done in this state, whilst the corporation was licensed to transact business therein. In the Grimm case, *supra*, 239 M. l. c. 187, I then took occasion to say:

"Neither do I believe section 7042, Revised Statutes 1909, charges our courts with the duty of hearing a case such as is now pending in the court of the respondent Grimm in the city of St. Louis. That section compels foreign insurance companies doing business in this State to make our State Superintendent of Insurance an agent to accept service of process. I believe that this section only confers jurisdiction upon our courts to hear and determine controversies growing out of insurance contracts made in this State, whilst a foreign insurance company is doing business in this State under a license from the State. It is said in the opinion by my learned brother that there is no limitation in this statute, and hence cases from other jurisdictions where there is a limitation in the statute are not in point. I think the statute, when considered as a whole, has a limitation. I think from this language there can be gathered a clear legislative intent to limit the jurisdiction of courts to actions upon contracts made in this State. Note the language: "Service of process as aforesaid, issued by any such court, as aforesaid upon the

Superintendent, shall be valid and binding and be deemed personal service upon such company, so long as it shall have policies or liabilities outstanding in this State." This follows the language emphasized by my brother, to my mind characterizes the kind of litigation to which foreign insurance companies can be called upon to respond in our courts. In other words, it fixes a limitation of the kind of causes over which our court can assume jurisdiction. The statute specifically refers to policies "outstanding in this 550 State." It is true that this clause refers to a time when such company has withdrawn from the State or is no longer doing business in the State, but it also refers to contracts made when in the State. The policies above mentioned in the statute are policies issued when the company was in the State. The question then arises, why preserve this method of service after the company has left the State and limit it to cases upon policies outstanding in this State only, if the previous portion of the statute referred to all kinds of actions whether upon contract in this State or contracts made out of this State?

To my mind the substituted method of service provided for in this statute only applies to actions arising upon contracts made in this State, and not to actions upon contracts made out of this State. In other words, the statute limits the class of causes in which this kind of service can be effectively had, and the case pending in respondent's court is not one of the class, if the averments in the defendant's motion are true. How the relator may now avail itself of the situation, with jurisdiction over its person having been decided by the majority, may be a question, but not one for discussion at this time. To do so would be but to suggest to counsel how to try their cases. To hold that such statute covers service in a case of this kind would make it violate the due process claimed of both state and Federal constitution.

For these reasons, somewhat hurriedly drawn, I dissent in this case, as well as in those which follow it upon the question discussed. Valliant, C. J., concurs in these views."

The exact question, since the writer expressed the foregoing views, has come up in the U. S. Supreme Court in construing a similar statute in the state of Louisiana. By Sec. 1 of the Louisiana act a foreign corporation was required to file a written declaration setting forth the places in the state where it was doing business and the name of its "agents in the state upon whom process may be served." See. 2 of the act reads:

"Whenever any such corporation shall do any business of 551 any nature in the state without having complied with the requirements of Sec. 1 of this act, it may be sued for any legal cause of action in any parish of the state where it may do business, and such service of process in such suit may be made upon the secretary of state the same and with the same validity as if such corporation had been personally served."

In Simon v. Southern R. Co. (U. S. Supreme Court Advance Opinions for 1914 l. c. 260) Mr. Justice Lamar, in discussing these statutes says:

"Subject to exceptions, not material here, every state has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 603, 42 L. ed. 569, 19 Sup. Ct. Rep. 308. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts, wherever made, and suits for torts, wherever committed, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carried on business. The manifest inconvenience and hardship arising from such extraterritorial extension of jurisdiction by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 22, 51 L. ed. 351, 27 Sup. Ct. Rep. 236, that the statutory consent of a foreign corpora-

552 tion to be sued does not extend to causes of action arising in other states.

In that case the Pennsylvania statute, as a condition of their doing business in the state, required foreign corporations to file a written stipulation agreeing, "that any legal process affecting the company, served on the insurance commissioners * * * shall have the same effect as if served personally on the company within the state." (P. 18). The Old Wayne Life Association having executed and delivered, in Indiana, a policy of insurance on the life of a citizen of Pennsylvania (p. 20), was sued thereon in Pennsylvania "has been doing business in the state of Pennsylvania, issuing policies of life insurance to numerous and divers residents of said court and state," and service was made on the commissioners of insurance. The association made no appearance, and a judgment by default was entered against it. Thereafter suit on the judgment was brought in Indiana. The plaintiff there introduced the record of the Pennsylvania proceedings and claimed that, under the full faith, and credit of the Constitution, he was entitled to recover thereon in the Indiana court. There was no proof as to the company having done any business in the state of Pennsylvania, except the legal presumption arising from the statements in the declaration as to soliciting insurance in that state. This court said:

"But even if it be assumed that the * * * company was engaged in some business in Pennsylvania at the time the contract in question was made, it cannot be held that the company agreed that service of process upon the insurance commission of that commonwealth would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with or for the benefit

of citizens of Pennsylvania (p. 21). * * * Conceding, then that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have assented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth,

such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. * * *

As the suit in the Pennsylvania court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice to the insurance commissioner, without any legal notice to the defendant association, and without its having appeared in person, or by attorney, or by agent in the suit; and as the act of the Pennsylvania court in rendering the judgment must be deemed that of the state within the meaning of the 14th Amendment, we hold that the judgment in Pennsylvania was not entitled to the faith and credit which, by the Constitution, is required to be given to the * * * judicial proceedings of the several states, and was void as wanting in due process of law."

From the principal announced in that case it follows that service under the Louisiana statute would not be effective to give the district court of Orleans jurisdiction over defendant as to a cause of action arising in the state of Alabama. The service on the Southern Railway, even if in compliance with the requirements of act 54, was not that kind of process, which could give the court jurisdiction over the person of the defendant for a cause of action arising in Alabama."

The italics are ours. To my mind this ruling of our highest tribunal will stand the test of reason. There is no doubt that a state can require a foreign corporation to come into the state upon terms. Among those terms may be the designation of an agent to receive service of process in suits brought in the courts of the state, but the reasonable construction of all such statutes is, that they refer to suits arising out of business done in the state, and not elsewhere. The laws of a state are presumably for the benefit of its own citizens, and not for out-siders.

The state when it imposes conditions upon foreign corporations is imposing conditions with reference to the business which the corporations expect to do in the state when they apply for 553 licenses. These conditions are imposed for the purpose of

protecting the state and its citizens. So that we maintain that this condition imposed by Sec. 7042, supra, should be read in that light. This state has no special interest in making its courts the rendezvous of all alleged causes of action arising in other states, whose laws and procedure may render the procurement of a judgment in such states. Section 7042, was never passed with the legislative intent to authorize such process to be served in cases arising in other jurisdictions. It should be construed (as we think it clearly reads) to have reference only to causes of action growing out of the contracts made and the acts done within this state. When thus construed, the trial court was without jurisdiction in the case, and it should have so adjudged under the pleadings and admissions made in the pleadings.

II.

It was said in the Grimm case that the form of the motion to quash the execution was such as to make a general appearance. To this I did not then agree and do not now. In the case at bar a similar contention is made. The suggestion in the Grimm case is that there are matters which go to the merits. In this case when the motion is read, whilst it is voluminous, it must in fairness be said that all that is said therein goes to the question of want of jurisdiction, and reasons why jurisdiction should not be assumed. The first paragraph of this motion is a rather lengthy way challenged the jurisdiction. It goes to nothing else. The second paragraph, at most, simply sets up reasons why the court should not assume jurisdiction over the person. Taken as a whole it is but a challenge to the jurisdiction and the appearance was special and not general.

It is further suggested that because the first lien or so of the answer uses the words:

"Now comes the defendant herein and after leave of court had and obtained, for its answer herein, says:"

The record proper shows no application for leave to answer. The whole record proper so far as relates to the matter here involved, reads:

554 "During the regular September Term, 1911, on September 4, 1911, the defendant filed a motion to quash writ and return.

Further during said September Term, 1911, on September 6, 1911, the court overruled defendant's motion to quash writ and return.

Further during said September Term, 1911, on September 14, 1911, awaiting the action of the Supreme Court and its decision, this cause was ordered passed without action by this court.

In Vacation, on December 16, 1911, this cause was by the court continued, awaiting the action of the Supreme Court.

During the regular March Term, 1912, on March 4, 1912, the defendant filed its answer, and deposited with the clerk of this court the sum of \$80.05 as tender of premiums and interest paid by the plaintiff to the defendant on said policy; which answer, omitting caption and signatures, is as follows:"

It will be noted that after the ruling upon the motion to quash the service every other act was done by the court it-self, until this answer was filed. Nothing in this record shows that defendant ever waived the matter of jurisdiction prior to filing its answer. If so, then by the very terms of Sec. 1804 R. S. 1909, the defendant did not waive the question, when it made such a question a part of its answer. It had the right to plead want of jurisdiction over its person along with other matters of defense. So that under the statutes of the state secs. 1890 & 1804 R. S. 1909 this question of jurisdiction (although it be jurisdiction of the person) is well preserved and is here for our review.

Under the law there can be no question that by filing an answer which only goes to the merits of the case, jurisdiction of the person is waived. It may also be waived by a general appearance for any

other purpose in the case, and it is useless to review the cases cited by counsel. Those cases are not this case. Here, like Houston vs. Publishing Co. 249 M. 332, we have a case where the question of jurisdiction over the person has been kept alive issue from start to finish. Under the law the trial court should have found for defendant upon this plea in the answer. Other questions in the record need not be discussed. Nor should our previous ruling in the Grimm, and the school of cases here with the Grimm case, be taken as stare decisis and preclude a further review of the question. In my humble judgment the question is of such grave concern that it should never be considered settled until it is settled right. Mangold vs. Bacon, 237 M. 496, and cases cited therein.

The judgment appealed from should be reversed and I so vote. Bond and Walker, JJ., concur in these views.

W. W. GRAVES, J.

[Endorsed:] Filed Apr. 14, 1916. E. F. Elliott, Circuit Clerk,
by _____, deputy.

556 In the Supreme Court of Missouri. In Banc.

And thereafter, to-wit, on April 3rd, 1916, the following further proceedings were had and entered of record in said cause:

"GOLD ISSUE MIN. & MILL. CO., Resp.,
vs.
PENN. FIRE INS. CO. OF PHILA., App.

Comes now the said appellant, by attorney, and files its motion for a rehearing herein."

And thereafter, to-wit, on April 10th, 1916, the following further proceedings were had and entered of record in said cause:

"GOLD ISSUE MIN. & MILL. CO., Respondent,
vs.
PENN. FIRE INS. CO. OF PHILA., Appellant.

Now at this day, the Court having fully considered and understood the motion heretofore filed by the said appellant for a rehearing herein, doth order that said motion be, and the same is hereby overruled."

Which said motion for rehearing is in words and figures as follows:

557 *Which said motion for rehearing is in words and figures as follows:*

In the Supreme Court of Missouri. En Banc. October Term, 1915.

No. 17289.

THE GOLD ISSUE MINING AND MILLING COMPANY, Respondent,
vs.
THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
Appellant.

Appellant's Motion for Rehearing.

Comes now the appellant, by its attorneys, and respectfully petitions, and moves this honorable Court to grant it a rehearing upon the errors assigned in the record herein, and to withdraw and annul the opinion heretofore filed herein, affirming the judgment of the court below. And as grounds and reasons for the reconsideration of this cause, appellant represents and shows unto the court and says:

That this honorable Court overlooked the following questions, decisive of this case, that the decision herein is in conflict 558 with the express statutes hereinafter mentioned, and with the controlling decisions hereinafter referred to. And in support of this, its motion for rehearing, appellant respectfully calls the attention of the court to the following statement of reasons for a reconsideration of this cause:

On the Merits.

I.

This Honorable Court erred in overlooking the principle announced in the controlling decision of *Jones v. Aspen Hardware Co.*, 21 Colo. 263.

At pages 92 to 106 of appellant's original brief, and at pages 14 to 16 in appellant's reply brief, both filed in division, the point was made that respondent, not having qualified to carry on business in Colorado, and the statutes of Colorado providing that upon failure to qualify a foreign corporation cannot acquire title to real property, respondent had no title to the real property upon which the insured buildings in the case at bar stood, and that therefore the insurance policy in suit, in accordance with its terms, was avoided.

The opinion in this case reaches the conclusion that this point is not well taken, on the grounds that the respondent acquired title to these premises, that defendant cannot attack such title, and that "the contract of purchase of the land mentioned" was valid.

In the first place no contract of purchase ever entered into the case. The question was whether respondent acquired any title to the property under the warranty deed purporting to convey the same.

559 To sustain the other grounds above mentioned, five Colorado cases are cited. All of these cases were decided before

the present law with respect to foreign corporations in Colorado had been passed, and therefore the present point could not possibly have been before the court in any of those cases. A glance at Sections 904 and 910 of the Revised Statutes of Colorado placed in evidence in the court below, will show that each of those sections was passed in 1901, and that then for the first time appeared the clause here relied upon, that no foreign corporation shall "hold or acquire any real or personal property" until it shall have become qualified to do business within the state.

Thus the case of *Allis v. Insurance Co.*, 11 Colo. App. 264, was decided in 1898 and involved only the question of the right of a foreign corporation to sue upon a contract, in no way touching any question of title to real property.

The case of *Taylor (Tabor) v. Mining (Manufacturing) Co.*, 11 Colo. 419, was decided in 1888, and also involved only the question of right to sue upon a contract.

The case of *Utley v. Mining Company*, 4 Colo. 369, was decided in 1878 and raised only the point of the right of a foreign corporation to sue when questioned by plea in abatement.

The case of *Kindle v. Beck Lithographing Co.*, 19 Colo. 310, was decided in 1893 and was also a case involving only the right of the foreign corporation to sue upon a contract.

The case of *Hyman v. Insurance Co.*, 42 Colo. 156, contains no mention of the rights of foreign corporations.

And finally, the case of *Fritts v. Palmer*, 132 U. S. 282; 33 L. Ed. 317, was decided in 1889, and the court there expressly says, as set forth in the opinion of the majority in this case:

560 "The Constitution and laws of Colorado, it should be observed, do not prohibit foreign corporations altogether from purchasing or holding real estate within its limits." (P. 319.)

These are the cases relied upon by the court in support of its conclusion on this point, and yet in none of these cases was the present statute in any way discussed, nor could it possibly have been, for, as above stated, the provision as to title to property, relied upon by appellant, was not then in force.

On the other hand the court fails to even mention the only Colorado case involving the question of title on the merits and absolutely ruling this point in favor of appellant. We refer to the case of *Jones v. Aspen Hardware Company*, 21 Colo. 263, put in evidence in the court below.

That case deals primarily with the question of title and it is there said, by Chief Justice Hayt, at page 270:

"The taking of title to the property in controversy being the exercise of a corporate power, and, as such, forbidden until the fee for filing has been paid, it follows that the title of the Aspen Hardware Company as a corporation cannot be upheld."

This case is discussed more at length at pages 101-103 of appellant's original brief in division, and no case was cited by respondent which in any way criticised the doctrine there announced as the law of Colorado.

The question of title to real property is to be determined in this

case by the law of Colorado. The Aspen Hardware case, representing the unquestioned doctrine of the court of last resort of that state, holds, that, in view of the statutes there in force, a foreign corporation under the disability of non-compliance cannot acquire title to property.

561 It is submitted that in relying on the cases above mentioned, and in no way considering the Aspen Hardware case, that is ruling and conclusive, the court in the case at bar has not only done gross injustice to this appellant, but has also violated that part of Section 1, of Article 4, of the Constitution of the United States, which provides:

"Full faith and credit shall be given in each state in the public acts, records, and judicial proceedings of every other state."

II.

This honorable court erred, in overlooking the following questions decisive of this case and duly submitted by counsel and the controlling authorities at pages 33 to 34 of appellant's main brief.

At pages 43 to 63 of appellant's main brief, appellant urged that the trial court erred in permitting the witness, Doepke, to testify over appellant's objections to conversations between the witness and appellant's agent, had prior to, and at the time of the execution and issuance of the policy, for the purpose of showing waiver of some of the terms and conditions of the policy. Appellant assigned further error to the trial court in permitting this witness to testify to conversations between himself and the agent of appellant, had after the policy was issued, and while the property was occupied and in operation, as to shutting down operations and vacating the property at some time in the future for a longer period than permitted under the express terms of the policy.

562 In the opinion of the majority, we find the following statement:

"Counsel for appellant assign as error, the action of the trial court in permitting the witness Doepke to testify to certain conversations had between him and Kilpatrick and Hanley, the general agents of the company at Cripple Creek, prior to and at the time the policy was issued, regarding the binding force of its terms and conditions respecting encumbrances upon and the vacancy of the property; also that the court erred in permitting said Doepke to testify as to conversations had between himself and said agents after the policy had been issued, regarding the vacancy of the property, and cites scores of cases in support thereof." * * *

While there is some conflict of authority upon these questions in other states, but in so far as Colorado, Missouri and many other states are concerned, it is well settled that where the general agents of an insurance company, at the time of or subsequent to the issuance of the policy, are informed of the existence of any fact regarding the property which is violative of any of the terms or conditions thereof, and which would work a forfeiture, and assent thereto, then the com-

pany is estopped from interposing such conditions of forfeiture as a defense to a suit brought upon the policy to recover the damages sustained."

From the foregoing quotation and the multitude of cases cited in support thereof, it is apparent that the majority wholly overlooked the point made by appellant in this connection, and the clear distinction between the line of cases holding such testimony competent for the purpose of showing waiver of breach of existing conditions and the line of cases holding such testimony incompetent when waiver of breaches of conditions not yet then in existence is sought to be shown by such testimony. This distinction is clearly shown by the cases from this and other jurisdictions, cited at pages 43 to 63 of appellant's main brief, which do not appear to have been considered by the court.

The majority opinion has wholly failed to consider the question raised by appellant of the admissibility over appellant's objections of the testimony of the witness Doeple as to conversations had 563 between the agent of appellant and himself prior to the issuance of the policy. Such testimony was clearly inadmissible under the familiar parol evidence rule.

III.

This honorable court erred in overlooking the following questions decisive of the case and duly submitted by counsel.

At pages 64 to 86 of appellant's main brief, appellant submitted and contended that no actual notice, of the facts sought to be charged to appellant as principal, for the purpose of showing waiver of some of the conditions of the policy, was ever given to the principal and that notice to and knowledge of its agents could not in law be imputed to the principal for the following reasons:

1. The agent, to the knowledge of the insured, had an interest adverse to the principal.

2. The agent was acting in collusion with and in the interest of the insured and against the interest of his principal.

3. The agent was attempting to act as the agent of both parties, without the knowledge of appellant, his principal.

It appears from the majority opinion that while the court gave some consideration to the second of these questions, it wholly overlooked the first and third questions, upon which we submit the evidence is undisputed, and which questions are decisive of this case on the question of waiver.

Upon the question of collusion, it is said in the majority opinion:

564 "There is not a scintilla of evidence in this case that tends to show that Kilpatrick and Hanley were acting collusively against the appellant."

We marvel that such a statement could be made after a reading of the record in this case. As we read the record, it is conclusive

and most clearly demonstrates that the insured and appellant's agents were acting in collusion for the purpose of concealing the breach of conditions of the policy which, if known to the insurer, would have resulted in a cancellation of the policy.

The adverse interest of appellant's agent, the collusion between the parties and the fact that the agent was attempting to act as the agent of both parties, without the knowledge or consent of appellant, his principal, is demonstrated by Exhibits 6 and 7, by the manufactured letters appearing as Exhibits 16 to 20, both inclusive, and by the testimony of the witnesses, all of which evidence is set forth at pages 8 to 23, both inclusive, of appellant's main brief.

The reasons for the rule for which we contend in this connection can be no better stated than in the language of Judge Sanborn, of the United States Circuit Court of Appeals, in the case of Pine Mountain Iron & Coal Co. v. Bailey, 94 Fed. 258, at 261:

"In consonance with this principle of the law of agency, the rule that notice to the agent is notice to the principal has an exception as well established as the rule itself. It is that when the agent acts for himself, in his own interest, and adversely to his principal, in a given negotiation or transaction, neither notice to nor the knowledge of the agent can be lawfully imputed to the principal.—(Citing numerous authorities.)—The reason of the general rule is that it is the duty of the agent to communicate to his principal the facts relative to any transaction in which he acts on his behalf, and that the law presumes that he has discharged his duty. But when the nominal agent commences to act in his own interest, and adversely to his principal, the presumption no longer obtains that he will communicate to him facts which might

prevent the consummation of the negotiation which he is
565 conducting on his own behalf, and the counter presumption
that he will conceal them arises. As the reason for the rule
no longer exists, the rule ceases to apply, and the exception pre-
vails."

On the Constitutional Question.

This honorable court was led into error by basing its conclusion upon its misquotation of the opinion in the case of Simon v. Southern Railway, 236 U. S. 115; 59 L. Ed. 492.

At page 29 of the majority opinion the following quotation purports to be taken from the Simon case:

"The Association made no appearance and a judgment by default was entered in Indiana. The plaintiff there introduced the record of the Pennsylvania proceedings and claimed that, under the full faith and credit clause of the Constitution, he was entitled to recover thereon in the Indiana Court."

A reference to the reported opinion in the Simon case discloses that this quotation should read as follows:

"The association made no appearance, and a judgment by de-

fault was entered against it. Thereafter suit on the judgment was brought in Indiana. The plaintiff there introduced the record of the Pennsylvania proceedings and claimed that, under the full faith and credit clause of the Constitution, he was entitled to recover thereon in the Indiana Court." (Pps. 500-501).

A large portion of the majority opinion is taken up with a discussion of the Simon and Old Wayne Cases, and an attempt is made to distinguish those cases from the case at bar, by reason of the fact that in the instant case, a power of attorney was filed under the statute appointing the State Superintendent of Insurance agent of the appellant company, for service of process, and the majority attempts to evade the holding of the Simon and Old Wayne cases, to the effect that the doing of business in a state by a foreign cor-

poration is equivalent to voluntary consent to service of process, by an ingenious course of reasoning based upon the above

misquotation. It must be evident that if the original judgment held invalid by the Federal Supreme Court in the Old Wayne case had been rendered in Indiana, as the above misquotation would seem to indicate, instead of in Pennsylvania as was the fact, the Old Wayne case would never have arisen. The conclusion of the majority of this court upon this question is summarized in the following sentence of the opinion:

"Such implication can only arise from the fact that the transaction out of which the suit grew was transacted in the state without authority."

From the foregoing it is apparent that the construction placed upon the Simon case by the majority opinion is based primarily upon the unwarranted assumption that the Southern Railway was not doing business in Louisiana, and from this it is inferred that such assumed fact was the sole foundation for the determination of the United States Supreme Court in that case as well as in the Old Wayne case. As stated in the opinion of the majority in the case at bar, the master in the Simon case did find that the Southern Railway was not doing business in Louisiana, but the opinion of the majority fails to state, and apparently overlooks the fact which appears in the statement by Mr. Justice Lamar in the Simon case (at page 121) that the Circuit Court of Appeals found "that the Railway Company was doing business in New Orleans." And what is of even more and primary importance, the court in the case at bar failed in any way to consider or even mention that part of the last paragraph of the opinion in the Simon case on this point. It is there said, after reaching the conclusion that the plaintiff had acquired no rights by reason of the Louisiana judgment:

"This conclusion makes it unnecessary to consider whether the Southern Railway was doing business in Louisiana." (Page 132).

567 It would seem absolutely clear from this statement by the Federal Supreme Court that whether or not the Southern Railway was doing business in Louisiana was absolutely immaterial

to the decision in the Simon case. This being so, the construction placed upon that case by the opinion of the majority in the case at bar, in the face of such express language, would seem to be wholly unwarranted.

We take this first opportunity of calling the court's attention to the case of *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 156 N. Y. S. 647 (Adv. sheets), a case just decided by the appellate division of the Supreme Court of New York, in which the construction of the Simon case contended for by appellants is sustained in every particular. It is interesting to note that in this case the New York Court had under consideration the identical statutes which were considered in the case of *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148, which appears to be much relied upon and is extensively quoted from in the majority opinion herein.

It is also stated in the opinion of the majority that if the principle for which appellant contends is sound:

"No suit could be brought in the courts of this, that or any other state against any foreign corporation doing business here, by any one, resident or nonresident, upon any cause of action accruing outside of this state. That is not the law, nor never will be, as long as the immaculate flower of justice continues to bloom in the human heart."

As was attempted to be shown in the early part of appellant's additional and reply brief before the Court en banc, the result reached by the Federal Supreme Court, under appellant's construction of the Simon case, was foreshadowed in *Lafayette Insurance Co. v. French*, 18 How. 404; 15 L. Ed. 451, at 452; 568 *St. Clair v. Cox*, 16 Otto 350; 27 L. Ed. 222; *Cable v. U. S. Life Insurance Co.*, 191 U. S. 288; 48 L. Ed. 188, and *Old Wayne Mutual Life Association v. McDonough*, 204 U. S. 8; 51 L. Ed. 345. This principle, a prophecy of the Simon case, is stated in the first of the above cases, and supported by substantial repetition in the others, as follows:

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states, and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state free from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

Under these conditions can it be truly said that such is not the law?

The majority opinion contains a historical analysis of transitory causes of action, all of which is most fitting and applicable in a case involving a cause of action between individuals, but most of

which fails to consider the complex conditions of modern business, and particularly of modern corporate business. If it be true that a transitory cause of action may be sued upon in any jurisdiction where the defendant can be found, without any restriction, then constitutional limitations are of no force or effect in this particular. And yet in the opinion of the court we find this statement:

"There is no other statute or law of this state that I am familiar with, which authorizes service of process in a suit brought in the courts of this commonwealth against a foreign insurance company not authorized to do business herein, based upon a policy issued by it in another state or country; but if there are any such, then they would clearly be unconstitutional under both the State and Federal constitutional provisions previously mentioned."

Is not this a direct recognition of the fact that a foreign 569 corporation is entitled to constitutional protection in some cases involving foreign causes of action? And if so, it certainly follows that the old common law theory of transitory actions is subject to constitutional limitations, and among these constitutional limitations the due process clause.

In this same connection the majority opinion in support of its contentions, states:

"If this was not the law, then the courts of this State could never acquire jurisdiction over the person or subject matter of any suit brought in the courts hereof against any insurance, railroad, telegraph, telephone or other foreign corporation, either lawfully or unlawfully doing business in this state, upon any cause of action growing out of any transaction not negotiated in this state, notwithstanding the fact that the plaintiff might be a resident of Missouri and the transaction may have been negotiated in California or New York."

570

Concerning Transitory Actions.

The majority opinion fails to distinguish between the law of transitory actions as applied to corporations and the law as applied to natural persons and between actual and substituted service of process.

The oft reiterated statement that this is a transitory action and, therefore, may be maintained wherever the Insurance Company may be found doing any business is too broad.

The further question remains whether jurisdiction of particular defendant exists in a particular case, and whether this insurance company can be found in Missouri with respect to an action arising between it and an Arizona corporation over a contract of insurance made in Colorado, to be performed in Colorado, covering property in Colorado.

So the general assertion that this is a transitory action but begs the question.

The rule as to transitory actions had its origin and became estab-

lished as to natural persons long before its application was attempted to be made to artificial persons. The rule was that at no time could jurisdiction be obtained by personal service upon an individual in more than one state, for the reason that he had but "one presence" and that an individual could be "found" in any state of his presence, whether it was his residence or not.

If a defendant was legally liable in Colorado, he could not escape that liability by going to Missouri.

The difficulty arose when attempt was made to apply the doctrine of transitory actions to artificial persons for they could not migrate from the state of their creation. However, corporations increased

in number and proportion and extended their activities beyond the state of their creation. Business was transacted outside of the state of its creation and the courts still adhering to their first decision that corporations could not migrate reasoned that it would be unfair to those persons having dealings with such corporation in an outside state to be required to go to the state of the incorporation to litigate such transactions, but based its legal and technical ground on the implied consent of the corporation to be sued in the jurisdiction where the transaction occurred, but consent express or implied from first to last lay at the foundation of the jurisdiction.

The reason of the rule for entertaining jurisdiction in suits against corporations outside of the state of their creation had its origin and foundation in the inconvenience of granting citizens of a state in which transactions occurred "no legal redress short of the seat of the Company in another state. In many instances the cost of the remedy would have largely exceeded the value of the fruits." Quotation from Railroad Co. v. Harris, 12 Wall. (79 U. S.) 65, one of the earliest and leading cases.

In the rule itself is found the law of agency mixed with consent expressed or implied on the part of the corporation to be sued outside the state of its creation.

Moreover, inconvenience and hardship are at the base of all legislation requiring the appointment of a process agent.

Inconvenience and hardship not to citizens of other states but to the citizens of the state where the transaction occurred.

As Justice Graves says in the dissenting opinion in this case: "These conditions (requiring the appointment of a process agent,) are imposed for the purpose of protecting the state and its citizens."

Legislation was not aimed to give an undue advantage to the plaintiff over a foreign corporation defendant, or to cause such defendant inconvenience or hardship in answering a cause of action in a state far distant from its origin.

Consent express or implied must be present to confer jurisdiction in suits against corporations outside the state of their creation. The courts still adhere to "The theoretical and legal view that the domicile of a corporation is only in the state where it is created." St. Clair v. Cox, 106 U. S. 350. This view is in harmony with the earliest and leading case of Railroad Company v. Harris, Supra, wherein the courts said of the Company, "It cannot migrate, but may

exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it will consent to be sued there. If it do business there, it will be presumed to have assented and will be bound accordingly."

Agency becomes a factor when it is borne in mind that the corporation cannot migrate from the state of its creation, but may be represented by its agents beyond the state line.

This being true, the design of all statutes is to secure service on a foreign corporation through its agents.

Our position is this: That a foreign non-complying corporation by going into a state to transact business, presumptively agrees or consents in so far as submitting itself to jurisdiction is concerned, to all the conditions required by the complying statute, as much as if it had actually formally complied. This is the holding in all the decisions, including the Old Wayne and the Simon cases. In other words, the doing of business has the same legal effect in conferring jurisdiction as complying.

By analogy assumption or implied contract stands on the same legal footing as a contract reduced to terms.

This is what is said of the Old Wayne case in the Simon case: "In that case the Pennsylvania statute 'as a condition of their doing business in the state, required foreign corporations to file a written stipulation agreeing that any legal process affecting the company served on the insurance commissioner * * * shall have the same effect as if served personally on the company within this state.'"

573 Words of similar import used in the Pennsylvania statute are used in Section 7042, Statutes of Missouri:

"A foreign insurance company desiring to transact business * * * shall file written instrument or power of attorney authorizing said superintendent to acknowledge or receive service of process * * * and consenting that service of process upon said superintendent shall be taken and held to be as valid as if served upon the company * * *."

We confidently state that by formally complying with the conditions of Section 7042, and reducing our consent in writing to the "actual terms of the statute," our formal consent was attended with no greater or different consequences than those attending the Old Wayne company by engaging in some business in Pennsylvania.

The purpose of the statutes of Pennsylvania and Missouri, which are similar to statutes of other states, is plainly to be seen.

They are "compulsory statutes," designed to confer jurisdiction by consent which would not otherwise exist in the absence of consent, in some form.

"Conceding, then, that by going into Pennsylvania, without first complying with its statute, the defendant Association may be held to have consented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. * * *" (Old Wayne case).

By the "common law" no corporation had any "presence" outside the state of its creation. So it may very properly be said that the early history of transitory actions which concerned natural persons only has very little, if any, bearing upon the law of transitory actions as applied to corporations. We have not the time to discuss this very interesting history found in the majority opinion, but we confidently believe that the revered Blackstone did not have in mind modern conditions.

574 By placing in juxtaposition the earliest and leading cases of Lafayette Insurance Company and Railroad Company v. Harris, *Supra*, and comparing those cases with the Old Wayne and Simon cases, by the same process of reasoning used in the first and last cases, we have this net result:

In the first cases the reason of the rule conferring jurisdiction is founded on inconvenience to plaintiff.

In the last cases, a broad principle is enunciated making for justice and convenience which puts the rule on the basis where it is supported by the reason originally given for it.

In the Simon case "inconvenience and hardship" were present as the reason, but both agency and consent were absent.

Now, let us consider an excerpt from the Simon case in the light of the U. S. Supreme Court decisions rendered of course "since the adoption of the Federal Constitution," and which supplant the law of England as to transitory actions:

"But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the State enacting the law. Otherwise, claims on contracts wherever made and suits for torts wherever committed might by virtue of such compulsory statute be drawn to the jurisdiction of any State in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra-territorial extension of jurisdiction, by virtue of the power to make such compulsory appointments, could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Life Association v. McDonough*, 204 U. S. 22, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other States."

It must be admitted beyond question or cavil that the U. S. Supreme Court has held: that for some transactions properly the subject of a transitory action—occurring outside of the state where a "foreign corporation might at any time be carrying on business"—the corporation has "not consented to be found" or made itself amenable to process—on that transaction—in that state.

The above excerpt quoted from the Simon case means this or it has no meaning.

575 Such a rule could not be applied to natural persons for a natural person is "found" wherever he is actually served, independent of his consent.

In the Simon case, consent was lacking, and it was held:

"That the Statutory consent of a foreign corporation to be sued, does not extend to causes of action arising in other states."

The statutory consent here mentioned is given as the result of a "compulsory statute." Statutory consent must necessarily mean either that compulsory express consent required of the corporation to be given before transacting business with the citizens of the state to make itself amenable to the jurisdiction of the courts of the state, or consent implied by doing business with the citizens of a state without a formal compliance with the statute.

Now let us consider the recent and much relied on case of *El Paso & Southwestern Co. v. Chisholm*, 180 S. W. 156. We will take two excerpts from that case which are quotations from U. S. Supreme Court decisions and one from *Peterson v. Railway Co.* cited as a leading authority.

"In *Railway Co. v. Sowers*, 213 U. S. 59, 29 Sup. Ct. 397, 53 L. Ed. 695, Mr. Justice Day, delivering the opinion of the court in that case, said:

'An action for personal injuries is universally held to be transitory, and maintainable wherever a court may be found that has jurisdiction of the parties and the subject-matter.'"

"Mr. Justice Day, in *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782, says:

'It is not necessary that express authority to receive service of process be shown. The law of the state may designate an agent upon whom service may be made, if he be one sustaining such relation to the company that the state may designate him for that purpose, exercising legislative power within the lawful bounds of due process of law.'

In *Peterson v. Railway Co.*, 205 U. S. 364, 51 L. Ed. 841, it is said:

"It is settled by the decisions of this court that foreign corporations can be served with process within the state only when doing business therein, and such service must be upon an agent who represents the corporation in its business."

Citing:

St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222;

Goldey v. Morning News, 156 U. S. 518, 521, 522, 39 L. Ed. 517;

Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 1113.

576 How can it be said that the Superintendent of Insurance of Missouri is "an agent who represents the corporation (Insurance Company) in its business"—in any manner whatever?

There is not the usual relation of agency involved.

Neither the right of voluntary appointment nor arbitrary discharge are vested in the principal.

The Insurance Company might have been inclined to have chosen one of its own agents in the State as its process agent, or even some other officer of the State than the Superintendent of Insurance, but the statute is prohibitive of such a course.

In the Peterson case, a provision of the Texas statute similar to statutes of most of the states was under consideration:

"Sec. 3. For the purpose of obtaining service of citation on foreign railway corporations, conductors who are engaged in handling trains and agents engaged in the sale of tickets or the making of contracts for the transportation of property as described in paragraph 2 of this act, are hereby designated as agents of said foreign corporations or companies, upon whom citation may be served."

The train conductor or the ticket agent is such an officer as may be appointed or relieved by his principal.

It may be said of them that they represent their principal in some degree concerning their principal's business, and are the actual representatives of the Company, voluntarily appointed as well as relieved at the will of the principal.

In the El Paso & Southwestern Co. v. Chisholm case, it is said of the Simon case:

"There was no voluntary agency relationship whatsoever existing between the officer so designated and the corporation."

In the Sowers case, the rule recognizes the necessity for "jurisdiction of the parties" and it is but begging the question to say this is a transitory action, and that therefore, suit is maintainable in Missouri, for the question still remains—is the defendant to be found in Missouri on the transaction involved?

577 Again it is said that the Courts of Missouri should and must be kept open to the citizens of every other state, as well as to the citizens of Missouri. This is guaranteed by the privileges and immunities clause of the Federal Constitution. But, as stated in appellant's reply brief, it has been repeatedly held, and is undoubtedly the law in every court in the Union, that a corporation is not a citizen within the meaning of the privileges and immunities clause, and that therefore that clause has no application to a suit such as the case at bar between two corporations. Selover, Bates & Co. v. Walsh, 226 U. S. 112; 57 L. Ed. 146. Orient Insurance Co. v. Daggs, 172 U. S. 557; 43 L. Ed. 552. Paul v. Virginia, 8 Wall, 168; 19 L. Ed. 432.

It seems clear that the opinion of the majority has overlooked this principle of law in its discussion of the privileges and immunities to which the citizens of other states are entitled.

And lastly, the court, in speaking of the inconvenience resulting from the principles contended for by appellant, entirely disregards the fact that a case can never be better tried than in the very place where the facts giving rise to the cause of action occurred, that in this very case, for example, when respondent chose to bring its suit in Missouri, it deprived appellant of the right it would have had, had the suit been brought in Colorado, to subpoena witnesses and compel them to appear and testify. Respondent selected Colorado as its place of operations, and in Colorado it took out insurance upon the property used in Colorado in those operations. Certainly from the standpoint of natural justice, there is nothing unfair in requiring respondent to bring a suit on any such policy primarily in Colorado, rather than in a state foreign in every way to

578 every part of the transaction. The question of convenience is a very material one, and no state has the right to assume to try a case under circumstances "inconsistent with those rules of public law which secure the jurisdiction and authority of each state free from encroachment by all others."

Appellant therefore respectfully prays this honorable court to grant a rehearing of the issues presented by the errors assigned in this cause in accordance with this petition.

Respectfully submitted,

FRED HERRINGTON,
DAVID H. ROBERTSON,
LEWIS & GRANT,
Attorneys for Appellant.

579 In the Supreme Court of Missouri. In Banc.

And thereafter, to-wit, on April 27th, 1916, the following further proceedings were had and entered of record in said cause:

No. 17298.

"THE GOLD ISSUE MINING & MILLING COMPANY, Respondent,
vs.
THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
Appellant.

Now at this day there are presented by the Pennsylvania Fire Insurance Company of Philadelphia, Appellant (Plaintiff in Error), to the Honorable A. M. Woodson, Chief Justice of the Supreme Court of Missouri, in Chambers, a petition for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of Missouri, a writ of error from the Supreme Court of the United States to the Supreme Court of Missouri, an assignment of errors, a supersedeas bond in the sum of \$10,000.00 and a citation directed to the said respondent (Defendant in Error) citing and admonishing it to be and appear in the Supreme Court of the United States, at Washington, within thirty days from the date thereof, which said writ of error is allowed, said assignment of errors filed, said bond, to operate as a supersedeas, approved and ordered filed, and said citation signed and issued."

580 Which said writ of error is in words and figures as follows:

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Missouri, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in

the said suit between The Gold Issue Mining and Milling Company, a corporation, and The Pennsylvania Fire Insurance Company of Philadelphia, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Pennsylvania Fire Insurance Company of Philadelphia, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do

581 command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 27th day of April, in the year of our Lord one thousand nine hundred and Sixteen.

[Seal of the United States District Court of Missouri, Central Division, Western District.]

JOHN B. WARNER,

*Clerk of the United States District Court for the
Western District of Missouri, Central Division,
By H. C. GEISBERG, Deputy.*

Allowed by:

A. M. WOODSON,

*Chief Justice of the Supreme Court
of the State of Missouri.*

582 [Endorsed:] No. 17298. United States of America, ss.
The Pennsylvania Fire Insurance Company of Philadelphia,
Plaintiff in Error, vs. The Gold Issue Mining and Milling Company,
Defendant in Error. Writ of Error. Filed Apr. 27, 1916. J. D.
Allen, Clerk.

583 Which said assignment of errors are in words and figures as follows:

UNITED STATES OF AMERICA,
State of Missouri, ss.:

In the Supreme Court of the State of Missouri.

No. 17298.

THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
Plaintiff in Error,

vs.

THE GOLD ISSUE MINING & MILLING COMPANY, Defendant in Error.

Assignment of Errors.

Comes now the plaintiff in error, by its attorneys, and feeling itself aggrieved by the judgment of the Supreme Court of Missouri rendered by said court in this cause on the 24th day of March, 1916, petition for a rehearing of which judgment was denied on the 11th day of April, 1916, filing herewith its petition for writ of error herein from the Supreme Court of the United States, and for the purpose of having said judgment reviewed in the United States Supreme Court, makes the following assignment of errors:

I.

The Supreme Court of Missouri erred in holding sufficient the service of process attempted to be made upon plaintiff in error in this cause, by substituted service of process upon the Insurance Commissioner of the State of Missouri, pursuant to the provisions of Section 7042 of the Revised Statutes of Missouri, 1909; the plaintiff 584 in error being a Pennsylvania corporation, the defendant in error an Arizona corporation, and the cause of action having arisen in Colorado upon a Colorado contract; and in not holding and adjudging said Section 7042 of the Revised Statutes of Missouri, 1909, in so far as it attempted or purported to authorize the service of process attempted to be made in this cause, to be unconstitutional, null and void and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and in violation of the rights, privileges and immunities guaranteed to the plaintiff in error by said Fourteenth Amendment to the Constitution of the United States.

The errors assigned in this respect are more particularly set forth as follows:

First. The said Section 7042 of the Revised Statutes of Missouri, 1909, is unconstitutional, null and void in that it denies due process of law, deprives persons of property without due process of law and denies to persons the equal protection of the law, contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States by reason of the fact that it authorizes and permits the Courts of Missouri, by substituted service of process under said statute, to draw to themselves jurisdiction over foreign causes of action

between non-residents, neither of whom is a citizen or resident of the state of Missouri, and the Supreme Court of Missouri erred in holding and deciding that the Circuit Court of Audrain County, Missouri had jurisdiction to hear, determine and render judgment in this cause, and its holding and decision in this respect denied to plaintiff in error due process of law, was an attempt to take the property of plaintiff in error without due process of law, and denied to plaintiff in error the equal protection of the law, contrary to the guaranties of the said Fourteenth Amendment.

Second. The said Section 7042 of the Revised Statutes of Missouri, 1909, is unconstitutional, null and void in that it denies due process of law, deprives persons of property without due process of law and denies to persons the equal protection of the law, contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States in so far as it attempts and purports to authorize and permit the Courts of Missouri, by substituted service of process under said statute to draw to themselves jurisdiction over foreign causes of action between non-residents, neither of whom is a citizen or resident of the State of Missouri; and the Supreme Court of Missouri erred in holding and deciding that the substituted service of process upon the Superintendent of the Insurance Department of the State of Missouri, attempted to be made in this cause, was sufficient to confer jurisdiction upon the Circuit Court of Audrain County, Missouri, over the person of this plaintiff in error and over the subject matter of this action, and that the action of said Circuit Court in assuming jurisdiction of this cause was not in violation of the rights of plaintiff in error under the Fourteenth Amendment to the Constitution of the United States and did not deprive plaintiff in error of its property without due process of law.

Third. The said Section 7042 of the Revised Statute of Missouri, 1909, is unconstitutional, null and void in that it denies due process of law, deprives persons of property without due process of law and denies to persons the equal protection of the law, contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States, in so far as it attempts and purports to authorize and permit the courts of Missouri, by substituted service of process under said statute, to draw to themselves jurisdiction over foreign causes of action between non-residents, neither of whom is a citizen or resident of the State of Missouri; and the Supreme Court of Missouri erred in holding and deciding that the substituted service of process upon the Superintendent of the Insurance Department of the State of Missouri, attempted to be made in this cause, was sufficient to confer jurisdiction over the plaintiff in error upon the Circuit Court of Audrain County, Missouri, and that the action of said Circuit Court in assuming jurisdiction over the person of plaintiff in error was not in violation of the rights of plaintiff in error as guaranteed to it by said Fourteenth Amendment.

Fourth. The said Section 7042 of the Revised Statutes of Missouri, 1909, is unconstitutional, null and void in that it denies due process of law, deprives persons of property without due process of

law and denies to persons the equal protection of the law, contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States, in so far as it attempts and purports to authorize and permit the Courts of Missouri, by substituted service of process under said statute, to draw to themselves jurisdiction over foreign causes of action between non-residents, neither of whom is a citizen or resident of the State of Missouri; and the Supreme Court of Missouri erred in holding and deciding that the substituted service of process upon the Superintendent of the Insurance Department of

the State of Missouri, attempted to be made in this cause,
587 was sufficient to confer jurisdiction over the subject matter of this cause of action upon the Circuit Court of Audrain County, Missouri, and that the action of said Circuit Court in assuming jurisdiction over the subject matter of this action was not in violation of the rights of plaintiff in error as guaranteed to it by said Fourteenth Amendment.

Fifth. The said Section 7042 of the Revised Statutes of Missouri, 1909, as construed by the Supreme Court of said state in this cause, is unconstitutional, null and void in that it denies due process of law, deprives the plaintiff in error of its property without due process of law, and denies to plaintiff in error the equal protection of the law, contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States, in so far as said section has been thus construed to authorize and permit the Courts of Missouri, by substituted service of process under said statute, to draw to themselves jurisdiction over this cause of action between two corporations, neither of which is incorporated under the Laws of the State of Missouri, nor a resident nor a citizen of said state, upon a contract of insurance, upon property located in the State of Colorado, made and to be performed in said State of Colorado.

II.

The Supreme Court of Missouri erred in its judgment and decision in this cause by giving to Section 7042 of the Revised Statutes of Missouri, 1909, a construction which brings said statute into conflict with the guaranties of the Fourteenth Amendment to the Constitution of the United States.

III.

The Supreme Court of Missouri erred in refusing and failing to give full faith and credit to the public acts, laws, records
588 and judicial proceedings of the State of Colorado, as by the record herein fully appears, in violation of Article IV Section 1, of the Constitution of the United States, and thereby deprives the plaintiff in error of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States in that the said cause failed and refused to consider or follow the controlling decisions of the Supreme Court of the State of Colorado on the construction of certain statutes of

said State of Colorado, and more particularly on the construction of Sections 904 and 910 of the Revised Statutes of Colorado, 1908, with reference to the qualification of foreign corporations to do business in Colorado and to acquire title to, hold and own real property in said state, whereby defendant in error as a non-complying foreign corporation failed to acquire title to the real estate upon which the property covered by the insurance policy in suit was situated, thus invalidating the insurance policy sued upon in this cause. That said statutes and controlling decisions were in evidence, were particularly called to the attention of said Supreme Court of Missouri and by reason thereof defendant in error was and is precluded from maintaining this action and was not entitled to judgment in this cause.

IV.

The Supreme Court of Missouri erred in affirming the judgment of the Circuit Court of Audrain County, Missouri, rendered in this cause.

V.

The Supreme Court of Missouri erred in not reversing the judgment of the Circuit Court of Audrain County, Missouri, and thereby deprived the plaintiff in error of the rights, privileges and immunities claimed by it and guaranteed to it under the Constitution of the United States.

Wherefore, The Pennsylvania Fire Insurance Company of Philadelphia, plaintiff in error aforesaid, prays that the aforesaid judgment and decision of the Supreme Court of Missouri may be 589 re-examined and may be reversed, annulled and altogether held for naught, and that judgment may be rendered in favor of plaintiff in error and for costs, and that this cause may be remanded with directions.

THE PENNSYLVANIA FIRE INSURANCE
COMPANY OF PHILADELPHIA,

Plaintiff in Error,

By DAVID H. ROBERTSON,
LEWIS & GRANT, AND
FRED HERRINGTON,

Attorneys for Plaintiff in Error.

590 [Endorsed:] No. 17298. United States of America, State of Missouri, ss. In the Supreme Court of the State of Missouri. The Pennsylvania Fire Insurance Company of Philadelphia, Plaintiff in Error, vs. The Gold Issue Mining and Milling Company, Defendant in Error. Assignments of Error. Filed Apr. 27, 1918. J. D. Allen, Clerk.

591 Which said citation, with service, is in words and figures as follows:

UNITED STATES OF AMERICA, ss:

To the Gold Issue Mining and Milling Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of Missouri, wherein The Pennsylvania Fire Insurance Company of Philadelphia is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Archelaus M. Woodson, Chief Justice of the Supreme Court of the State of Missouri, this 27th day of April, in the year of our Lord one thousand nine hundred and sixteen.

A. M. WOODSON,

Chief Justice of the Supreme Court of the State of Missouri.

Attest:

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,

Clerk of the Supreme Court of Missouri.

592 COUNTY OF COLE:

I hereby certify that I served the within citation on said Defendant in Error by delivering a true copy thereof to Fauntleroy, Cullen & Hay, Counsel for said defendant in error on the 29th day of April, 1916.

H. C. SCHULT,

Marshal of the Supreme Court of Missouri.

Service of the within Citation is herewith acknowledged this 29th day of April, 1916.

FAUNTLEROY, CULLEN & HAY,

Attorneys for Defendant in Error.

[Endorsed:] No. 17298. United States of America, ss. The Pennsylvania Fire Insurance Company of Philadelphia, Plaintiff in Error, vs. The Gold Issue Mining and Milling Company, Defendant in Error. Citation. Filed May 1, 1916. J. D. Allen, Clerk.

593 Which said certificate of lodgment is in words and figures as follows:

No. 17298.

Certificate of Lodgment.

SUPREME COURT,

State of Missouri, ss:

I, J. D. Allen, Clerk of said Court, do hereby certify that there

was lodged with me as such Clerk on the 27th day of April, 1916, in the matter of The Pennsylvania Fire Insurance Company of Philadelphia, a corporation, Plaintiff in Error, versus The Gold Issue Mining and Milling Company, a corporation, Defendant in Error,

1. The original bond, a copy of which is herein set forth.
2. The Writ of Error as herein set forth, and a copy thereof, the original Writ of Error to file in my office, and a copy for the Defendant in Error, The Gold Issue Mining and Milling Company.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Jefferson City, Missouri, this 27th day of April, 1916.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court of Missouri.

594 [Endorsed:] No. 17298. In the Supreme Court of the State of Missouri. The Pennsylvania Fire Insurance Company of Philadelphia, Plaintiff in Error, vs. The Gold Issue Mining and Milling Company, Defendant in Error. Certificate of Lodgment. Filed Apr. 27, 1916. J. D. Allen, Clerk.

595 Which said petition for writ of error is in words and figures as follows:

UNITED STATES OF AMERICA,
State of Missouri, ss.

In the Supreme Court of the State of Missouri.

No. 17298.

THE GOLD ISSUE MINING AND MILLING COMPANY, Respondent,
vs.

THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
Appellant.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of Missouri.

To the Honorable Archelaus M. Woodson, Chief Justice of the State of Missouri:

Your Petitioner, The Pennsylvania Fire Insurance Company of Philadelphia, a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, respectfully represents and shows:

That on to-wit, the Twenty-fourth day of March, A. D. 1916, the Supreme Court of the State of Missouri rendered a final judgment against your Petitioner in a certain cause wherein your Petitioner was Appellant and the above named, The Gold Issue Mining and

Milling Company, was Respondent, in and by which said final judgment, a certain judgment theretofore rendered and entered in and by the Circuit Court of Audrain County, Missouri, was affirmed, all of which will more fully appear by reference to the record of proceedings in said cause, to which reference is hereby made and had, and that the Supreme Court of Missouri is the highest court in said State in which a decision in said suit can be had.

Your Petitioner further represents that in said action certain rights were claimed by your Petitioner under the Constitution of the

United States, and the aforesaid decision of the Supreme
596. Court of Missouri is and was against the rights especially set up and claimed under said Constitution of the United States.

And your Petitioner claims the right to remove said judgment of the Supreme Court of the State of Missouri to the Supreme Court of the United States by Writ of Error under Section 237 of the Act of Congress to qualify, revise and amend the laws relating to the Judiciary, approved March 3, 1911, and designated "The Judicial Code," because in the aforesaid suit, there is and was drawn in question by your Petitioner the validity of a certain statute of the State of Missouri as applied and construed by the Supreme Court of that State in this suit, to-wit, Sec. 7042, Revised Statutes of Missouri, of 1909, the validity of said statute being questioned by your petitioner on the ground of its repugnancy to the Fourteenth Amendment to the Constitution of the United States, and to the provisions thereof, and in and by said suit there is and was likewise drawn in question an authority and jurisdiction exercised by said State of Missouri by and through the Circuit Court of Audrain County, Missouri, and by and through the Supreme Court of the State of Missouri, in pursuance of said statute, and the decision of the Supreme Court of Missouri is and was in favor of the validity of said statute, and of the authority and jurisdiction exercised in pursuance thereof. And in said cause, your Petitioner likewise claimed a certain right, privilege and immunity, under the constitution of the United States, to-wit, the right to due process of law, thereby denying the authority and jurisdiction assumed and exercised by said Circuit Court of Audrain County and Supreme Court of the State of Missouri; and the said decision of the Supreme Court of the State of Missouri is and was against the said right, privilege and immunity so claimed. That in

said cause your Petitioner aforesaid did especially set up and
597 claim in and by its motion to quash the writ and return of summons in said cause and in and by its answer filed in said cause that neither the Circuit Court of Audrain County nor any other court of the State of Missouri had jurisdiction over this petitioner in this action or over the subject matter of this action, and that the act of said Circuit Court of Audrain County in assuming jurisdiction over the trial of this cause, and in assuming to try the same, was in violation of the rights of your petitioner under the Fourteenth Amendment to the Constitution of the United States aforesaid, and constituted a deprivation of the property of your petitioner without due process of law, contrary to the provisions of the Fourteenth Amendment aforesaid. And your petitioner further represents that

the decision of the said Circuit Court of Audrain County and the decision of the said Supreme Court of Missouri affirming the decision of the Circuit Court of Audrain County as aforesaid, were against the rights, privileges and immunities especially set up and claimed under said Constitution of the United States.

That on, to-wit, the 11th day of April, A. D. 1916, the said Supreme Court of the State of Missouri did, in the suit and proceeding aforesaid, deny the application and petition of your petitioner, The Pennsylvania Fire Insurance Company of Philadelphia for a rehearing of said cause, whereby the judgment of said Supreme Court of Missouri in said cause became final.

That the right, privilege and immunity especially set up and claimed by your petitioner, all of which will more fully appear by the record of the proceedings in said cause to which reference is hereby made and had, arises in the following manner, to-wit:

That during the year 1909 Appellant, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania executed and issued, in the State of Colorado, to Respondent, a co-

poration organized and existing under and by virtue of the laws of the State of Arizona, a certain fire insurance policy insuring certain property situated in the State of Colorado. That thereafter said property was destroyed by fire. That during the year 1911 Respondent commenced this action in the Circuit Court of Audrain County, Missouri, and service of process upon Appellant was attempted to be had by substituted service upon the Superintendent of the Insurance Department of the State of Missouri, pursuant to the provisions of Section 7042 of the Revised Statutes of Missouri 1909. Whereupon Appellant appeared especially and moved in said Circuit Court of Audrain County and asserting its right protection under the Fourteenth Amendment to the Federal Constitution. The motion to quash being overruled, Appellant again raised its objections to the jurisdiction by incorporating the grounds of its motion to quash as one of the defenses in its answer. That the after the Circuit Court of Audrain County overruled Appellant's contentions and claims to the aforesaid rights, privileges and immunities under said Fourteenth Amendment to the Constitution of the United States and upon appeal the Supreme Court of the State of Missouri affirmed the judgment and decree of said Circuit Court of Audrain County, thereby denying to your petitioner the right, privilege and immunity especially set up and claimed under the Fourteenth Amendment as aforesaid, giving decision against your petitioner and in favor of the validity of the aforesaid statute of the State of Missouri and giving decision in favor of the validity of authority and jurisdiction exercised by said Circuit Court of Audrain County. And your petitioner has duly raised, presented and argued its claims and contentions with respect to the matters and the aforesaid, both in said Circuit Court and in said Supreme Court of the State of Missouri as will more fully appear from the record of the proceedings had in said cause.

And your petitioner further represents and shows that

599 aforesaid contract of insurance having been entered into in the State of Colorado, was and is governed as to its validity by the statutes of the State of Colorado and by the decisions of the courts of Colorado, construing said statutes. That the said Circuit Court of Audrain County and the Supreme Court of the State of Missouri have refused to consider or follow controlling decisions rendered by the Supreme Court of the State of Colorado on the construction of the statutes aforesaid, although said decisions of the Supreme Court of the State of Colorado were put in evidence in this cause and were repeatedly called to the attention of said Circuit Court and Supreme Court of the State of Missouri. That said Circuit Court and Supreme Court of the State of Missouri in ignoring and refusing to follow the aforesaid decisions of the Supreme Court of the State of Colorado have refused to extend full faith and credit to the judicial proceedings of said State of Colorado, contrary to Section 1 of Article 4 of the Constitution of the United States, and to the provisions thereof. And your petitioner has duly raised, presented and argued its claims and contentions with respect to the aforesaid statutes and decisions both in said Circuit Court and in said Supreme Court of the State of Missouri, all of which will more fully appear by the record of the proceedings in this cause to which reference is hereby made.

Wherefore, your Petitioner prays the allowance of a Writ of Error from the said decision and judgment of the Supreme Court of the State of Missouri returnable unto the United States Supreme Court, in manner and form as by law required, for citation, and for an order fixing the amount of a supersedeas bond.

THE PENNSYLVANIA FIRE INSURANCE
COMPANY OF PHILADELPHIA,

Petitioner,

By DAVID H. ROBERTSON,
LEWIS & GRANT AND
FRED HERRINGTON,

Attorneys for Petitioner.

The Writ of Error as prayed is hereby allowed.

A. M. WOODSON,
*Chief Justice of the Supreme Court
of the State of Missouri.*

600 [Endorsed:] No. 17298. In the Supreme Court of the State of Missouri. United States of America, State of Missouri, ss: The Gold Issue Mining and Milling Company, Respondent, vs. The Pennsylvania Fire Insurance Company of Philadelphia, Appellant. Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of Missouri. Lewis and Grant, and David H. Robertson, and Fred Herrington, Attorneys for Appellant. Filed Apr. 27, 1916. J. D. Allen, Clerk.

601 Which said order allowing said writ of error in said cause is in words and figures as follows:

In the Supreme Court of the State of Missouri.

No. 17298.

THE GOLD ISSUE MINING AND MILLING COMPANY, Respondent,
vs.
THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
Appellant.

Order Allowing Writ of Error.

Now comes The Pennsylvania Fire Insurance Company of Philadelphia, which was Appellant in the Supreme Court of Missouri, and presents to the undersigned, as Chief Justice of the Supreme Court of the State of Missouri, its petition for writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, together with its assignments of error; and the undersigned, as Chief Justice of the Supreme Court of the State of Missouri, having considered said petition and the assignments of error accompanying the same, and being duly advised in the premises, hereby orders and directs that the writ of error do issue from the Supreme Court of the United States to the Supreme Court of the State of Missouri, in the manner and form as provided by law, upon the filing of a bond in the usual form in the sum of — such bond, when approved, to act as a supersedeas.

Dated at Jefferson City, Missouri, April 27th, 1916.

A. M. WOODSON,

*Chief Justice of the Supreme Court
of the State of Missouri.*

602 [Endorsed:] No. 17298. In the Supreme Court of the State of Missouri. The Gold Issue Mining and Milling Company, Respondent, vs. The Pennsylvania Fire Insurance Company of Philadelphia, Appellant. Order Allowing Writ of Error. Filed Apr. 27, 1916. J. D. Allen, Clerk.

603 A copy of which said bond is in words and figures as follows:

In the Supreme Court of the State of Missouri.

No. 17298.

THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,
a Corporation, Plaintiff in Error,
vs.
THE GOLD ISSUE MINING AND MILLING COMPANY, a Corporation,
Defendant in Error.

Know all men by these presents, that we, The Pennsylvania

Fire Insurance Company of Philadelphia, as principal, and United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto The Gold Issue Mining and Milling Company, in the sum of Ten Thousand Dollars (\$10,000.00) to be paid to said obligee, its successors and assigns, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of April, A. D. 1916.

Whereas, the above named, The Pennsylvania Fire Insurance Company of Philadelphia, has prosecuted a Writ of Error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Missouri,

Now, therefore, the condition of this obligation is such that
 604 if the above named Plaintiff in Error shall prosecute its
 said Writ of Error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA,

(Signed) By DAVID H. ROBERTSON, *As Agent.*
 (Signed) UNITED STATES FIDELITY AND
 GUARANTY COMPANY OF BALTIMORE,
 MARYLAND,

By EDSON L. BURCH,

Its Attorney in Fact.

Bond approved and to operate as a supersedeas, this 27th day of April, A. D. 1916.

(Signed) A. M. WOODSON,
*Chief Justice of the Supreme Court
 of the State of Missouri.*

605

In the Supreme Court of Missouri.

THE GOLD ISSUE MINING & MILLING COMPANY, Defendant in Error,
 vs.

THE PENN. FIRE INSURANCE COMPANY OF PHILADELPHIA, Plaintiff
 in Error.

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and correct copy of all records, papers and proceedings in the above entitled cause, as called

for in the preeipe for a transcript filed herein, as fully as the same appear of record or on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Supreme Court of Missouri in my office in the City of Jefferson, State aforesaid, this 11th day of July, 1916.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,

Clerk of the Supreme Court of the State of Missouri.

Endorsed on cover: File No. 25,414. Missouri Supreme Court. Term No. 584. The Pennsylvania Fire Insurance Company of Philadelphia, plaintiff in error, vs. The Gold Issue Mining and Milling Company. Filed July 20th, 1916. File No. 25,414.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

PENNSYLVANIA FIRE INSURANCE
COMPANY OF PHILADELPHIA,
PENNSYLVANIA,

Plaintiff in Error,
vs.

THE GOLD ISSUE MINING & MILLING
COMPANY,

Defendant in Error.

} No. 584.

Error to the Supreme Court of the State of Missouri.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, The Gold Issue Mining & Milling Company, and moves the Court in the alternative either to dismiss the writ of error herein or to affirm the judgment of the State Court, for the following reasons, to-wit:

First. The decision of the Supreme Court of the State of Missouri is not such as is reviewable by this Court according to the terms of Section 237 of the Judicial Code of the United States.

Second. The judgment and decision of the Supreme Court of the State of Missouri is obviously correct,

and it is manifest this writ of error was taken for delay only, and the questions, upon which the decision of this case depend, have already been determined by many decisions of this Court and the questions on which the decision of this cause depend in this Court upon this writ of error are so frivolous as not to need further argument.

Third. The only question presented in this record is the validity of the service of process in a cause of action arising outside the state upon an agent of a foreign insurance company, which agent the plaintiff in error voluntarily appointed, and in the State Court defendant appeared generally to the action and by such appearance the alleged Federal or constitutional question is eliminated from the case.

Fourth. The courts of Missouri have jurisdiction over causes of action arising outside of that State between non-residents, and in such cases service of process upon an agent voluntarily appointed by a foreign company doing business in the State is sufficient notice and constitutes due process of law, and this exact question has been decided by this Court in Railroad Co. v. Estill, 147 U. S. 591; N. E. Mutual Life Ins Co. v. Woodworth, 111 U. S. 146, and many other cases.

Fifth. Because in the case at bar the Supreme Court of Missouri found as a fact that the plaintiff in error had given its express consent that service (in a case of this kind) might be obtained on its agent which it voluntarily appointed, and said court further found as a fact that the plaintiff in error had a domicile in the State of Missouri and had, for the purpose of service, become a resident of the county in which it was sued and the State Court's decision rests on non-

Federal grounds broad enough to support the judgment of the State Court.

Sixth. The State law authorizing service of process on a foreign corporation doing business in a state, in a cause of action arising outside of the State upon an agent voluntarily appointed by the corporation is not in violation of the Constitution of the United States and objection to such service in nowise involves the construction or application of the Federal Constitution and such rule has been finally settled by the previous decisions of this Court.

Seventh. The plaintiff in error in this case is precluded and estopped from questioning the constitutionality of the laws of the State of Missouri, permitting it as a foreign corporation to be sued on a cause of action arising outside of the State of Missouri, because it voluntarily complied with and accepted said laws, obtained license to transact business in Missouri and did "do business" in Missouri, and obtained thereby great privileges it did not possess and could not claim or enjoy without accepting the conditions imposed upon it by the Missouri laws.

Eighth. The State Court in State *ex rel.* Insurance Co. v. Barnett, 239 Mo. 193, being prohibition proceedings instituted by the plaintiff in error and other insurance companies to test the issue of jurisdiction in the case at bar, held that the defendant appeared to the action, and this is a non-Federal question broad enough to support the State Court's judgment, and final judgment sustaining the jurisdiction was entered in the prohibition case, and that judgment is *res adjudicata* on the issue of jurisdiction and does not involve a Federal constitutional question, and plaintiff

acquiesced in said decision and did not sue out writ of error to have it reviewed by this Court.

Wherefore, defendant in error prays the Court to either dismiss the writ of error herein or to affirm the judgment of the State Court, and it submits herewith brief and argument in support of this motion.

Florance J. Keuntzley
Patrick Henry Callahan
Charles M. Hargrave

Attorneys for Defendant in Error.

St. Louis, Mo., November, 1916.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

PENNSYLVANIA FIRE INSURANCE
COMPANY OF PHILADELPHIA,
PENNSYLVANIA,

Plaintiff in Error,

vs.

THE GOLD ISSUE MINING & MILLING
COMPANY,

Defendant in Error.

} No. 584.

Error to the Supreme Court of the State of Missouri.

**BRIEF AND ARGUMENT IN SUPPORT OF
MOTION TO DISMISS.**

This is a suit instituted June 6, 1911, in the Circuit Court of Audrain County, Missouri, by the Mining Company against the Insurance Company to recover the sum of \$2,500, alleged to be due the former under the terms of a policy of insurance dated October 5, 1909, insuring certain property in the State of Colorado against damage and loss by fire. A trial was had, which resulted in a judgment for the Mining Company, and the defendant Insurance Company, in proper time and in due form, appealed the cause to the Supreme Court of

Missouri, and that Court, sitting *in banc*, affirmed the judgment of the lower court in a lengthy opinion. See 184 S. W. 999. Transcript of Record, 270.

The jurisdiction of the State Circuit Court has been considered twice by the Missouri Supreme Court in this identical case. The defendant filed a motion to quash summons and service of process in the Circuit Court, which motion was by the Court overruled. Then the plaintiff in error, together with other insurance companies, sued out a writ of prohibition in the Supreme Court to prevent the State Court from trying the case. A temporary writ was issued, due and proper return was made and the prohibition proceedings came on for final hearing in the Supreme Court and a final judgment was entered dismissing the temporary writ, thereby permitting and instructing the State Court to retain jurisdiction and proceed with the trial. The prohibition case referred to is *State ex rel. v. J. D. Barnett, Judge*, 239 Mo. 193, and was argued, submitted and determined in connection with *State ex rel. v. Grimm*, 239 Mo. 135, and as the issues in both cases were identical, the Supreme Court of Missouri delivered the principal opinion in the *Grimm case, supra*, and adopted said opinion as the opinion of the Court in the case of *State ex rel. v. Barnett*, 239 Mo. 193, the Court in the Barnett case saying: "We have carefully considered this case and have found no fact or principle of law governing the same which leads to a different conclusion from what was reached in" *State ex rel. v. Grimm*. It is the contention of the defendant in error that the opinion in the Grimm case, *supra*, is in contemplation of law and in truth and in fact the opinion in the Barnett case, *supra*, and that the holding of the Court in the Grimm case that the defendant appeared,

etc., is conclusive and controlling in the present case, because the facts, relevant to the issue of appearance, are the same in all essential features in each case and the Supreme Court of Missouri so held.

The Mining Company is a corporation duly organized under the laws of the State of Arizona. The defendant is a fire insurance corporation duly organized under the laws of the State of Pennsylvania, and at all times mentioned in this suit, and at the time this suit was commenced, was, and ever since had been, duly licensed as a foreign insurance company to do business in the State of Missouri.

The petition was in due form, charging that the Mining Company was a corporation duly organized under the laws of Arizona. That at all the times therein stated the defendant was a foreign insurance company, organized under the laws of Pennsylvania, and was duly licensed under the laws of the State of Missouri to carry on a general fire insurance business herein, and was at all of said times carrying on said business in said State. That on August 13, 1910, the property of the Mining Company was struck by lightning and destroyed and damaged to the amount of \$134,000. The policy was a regular standard policy, containing the usual terms and conditions.

At the September Term, 1911, of the Circuit Court of Audrain County, the defendant filed in the cause a motion to quash the summons and the return of service thereof made by the Sheriff of Cole County on the Superintendent of Insurance of the State of Missouri, which was by the Court overruled.

Thereupon the cause was passed to await the decision of the Court in the case of *State ex rel. v. Barnett*, 239 Mo. 193, 143 S. W. 501, in which proceeding

the Insurance Company was a petitioner for prohibition, which petition on full hearing was denied. That after that case had been decided the defendant, after leave of court had been obtained, filed answer, which is substantially as follows: The answer alleges the service was had upon the Superintendent of Insurance; that the Court acquired no jurisdiction over defendant because neither party was a resident of Missouri and the action accrued in Colorado, and therefore Section 7042, R. S. of Missouri 1909, did not apply; that said section is unconstitutional and void, because in violation of Section 1, Amend. 14, of the Federal Constitution.

The statute which the Insurance Company insists is unconstitutional is Section 7042, Revised Statutes of Missouri, and is as follows:

“Section 7042. Any insurance company not incorporated by or organized under the laws of this State, desiring to transact any business by any agent or agents in this State, shall first file with the Superintendent of the Insurance Department a written instrument or power of attorney, duly signed and sealed, appointing and authorizing said superintendent to acknowledge or receive service of process issued from any court of record, justice of the peace, or other inferior court, and upon whom such process may be served for and in behalf of such company * * * in any court of this State. * * * and consenting that service of process upon said superintendent shall be taken and held to be as valid as if served upon the company, according to the laws of this or any other State. Service of process as aforesaid, issued by any such court as aforesaid, upon the superintendent, shall be valid * * * and be deemed per-

sonal service upon such company, so long as it shall have any policies or liabilities outstanding in this State. * * * Every such instrument of appointment executed by such company shall be attested by the seal of such company, and shall recite the whole of this section, and shall be accompanied by a copy of a resolution of the board of directors or trustees of such company similarly attested, showing that the president and secretary, or other chief officers of such company, are authorized to execute such instrument in behalf of the company; and if any such company shall fail, neglect or refuse to appoint and maintain, within the before described, it shall forfeit the right to do or continue business in this State."

On May 11, 1899, the appellant filed with the Superintendent of Insurance an instrument in the nature of a consent and appointment in compliance with the requirements of the Revised Statutes of Missouri, 1889, stating the desire of the appellant to transact business in the State of Missouri pursuant to the laws thereof, setting forth fully said section (then numbered 5912). And thereupon, and under that authority, the insurance company has continued to the present time to transact its said business in the State of Missouri under said license. This is the law under which the appellant came into the State of Missouri to transact an insurance business, and its status before the law of the State, including its agreement for service of legal process upon it through the Insurance Commissioner of this State.

The Supreme Court of Missouri construed and interpreted said section 7042 and held that after the execution of the power of attorney outlined in the statute,

and so long as a foreign insurance company is "doing business" within the State it may be sued upon a contract of insurance made with a non-resident outside of the State covering property outside of the State, by serving process upon the Insurance Commissioner. The only question before this Court, therefore, is whether the law as construed is in violation of the Constitution of the United States.

In other words, the Supreme Court of Missouri holds that the statute was designed and intended to authorize suits to be brought on insurance contracts of all kinds, whether made within or without the State, regardless of where the property insured is located at the time of the loss.

The Supreme Court further held that upon the execution of the power of attorney and the receipt of the license, a foreign insurance company may transact business in this State, and if it is "doing business" within the meaning of the law, it has a domicile in the State of Missouri for the purpose of service, and on this phase of the case said and held as follows:

"That article places all of said foreign companies upon an equality before the law with domestic companies, including the rights to open offices, appoint agents, issue policies in every portion of the State, and to sue and be sued. Any such foreign company which has complied with Sections 7040, 7041 and 7042, R. S. 1909, for all practical purposes becomes a citizen of this State in the same sense as do domestic companies of the same character; and are considered citizens of this State and possess all of the rights, privileges and immunities that are possessed by the latter. Of course the foreign company must renew its license

to do business within the State every year, but so long as that license remains in force there is no distinction between the rights, powers, duties and obligations of the foreign and domestic corporation; and such a 'corporation must be regarded as having a domicile' in this State (*New England Life Insurance Co. v. Woodworth, supra*).'' (111 U. S. 138.)

"And 'within the contemplation of the statute relating to service of summons upon foreign insurance companies, such companies are regarded as residing in each county in this State' (State *ex rel.* v. Grimm, 239 Mo., *loc. cit.* 166, 143 S. W. 402; Meyer v. Ins. Co., 184 Mo., *loc. cit.* 486, 83 S. W. 479).

"And 'it must be conceded that the only mode by which a foreign insurance company can be served with process in this State is by the method provided for in said section 7042' (State *ex rel.* v. Grimm, 239 Mo., *loc. cit.* 160, 143 S. W. 490; Baile v. Equitable Fire Ins. Co., 68 Mo. 617; Mid-dough v. Railway, 51 Mo. 520)."

The following are the substance of the sections of the Revised Statutes of Missouri applicable to foreign insurance companies:

Section 7041 enacts that no individual or association of individuals, under any style or name, shall be permitted to do the business mentioned in this chapter within the State of Missouri, unless he or they shall first fully comply with all the provisions of the laws of this State governing the business of insurance. * * *

Section 7040 declares no company shall transact in this State any insurance business, unless it shall first procure from the superintendent of the insurance de-

partment of this State a certificate stating that the requirements of the insurance laws of this State have been complied with authorizing it to do business.

Section 7019 requires a foreign company to file with the superintendent of the insurance department a statement of its condition and affairs in the United States, and shall, at such times as may be required by the superintendent, file a similar statement of its condition and affairs elsewhere than in the United States

Section 7047 enacts that foreign companies admitted to do business in this State shall make contracts of insurance upon property or interests therein only by lawfully constituted and licensed **resident** agents, who shall countersign all policies so issued. * * *

Section 7054 declares that any association of individuals and any corporation transacting in this State any insurance business, without being authorized by the superintendent of the insurance department of this State so to do, shall be liable to a penalty of two hundred and fifty dollars for each offense. * * *

Section 7044. Additional service.—Service of summons in any action against an insurance company, not incorporated under and by virtue of the laws of this State, and not authorized to do business in this State by the superintendent of insurance, shall, in addition to the mode proscribed in section 7042, be valid and legal and of the same force and effect as personal service on a private individual, if made by delivering a copy of the summons and complaint to any person within this State who shall solicit insurance on behalf of any such insurance corporation, or make any contract of insurance, or collect or receive any premium for insurance, or who adjusts or settles a loss or pays

the same for such insurance corporation, or in any manner aids or assists in doing either (R. S. 1899, Sec. 7992).

Sections 7014, 7015 and 7016 evidence the same general policy.

POINTS AND AUTHORITIES.

I.

The defendant appeared to this action in the State court so completely and perfectly, as appearance is defined by law, promulgated and enforced by this Court and by the Supreme Court of Missouri, that it is precluded from raising any question relating to due process growing out of the service of process upon it.

Jones v. Andrews, 12 Wall. 329;
Voorhees v. U. S. Bank, 10 Pet. 449, 473;
Fitzgerald Cons. Co. v. Fitzgerald, 137 U. S. 98;
Texas & Pac. Ry. Co. v. Hill, 237 U. S. 208;
State *ex rel.* v. Grimm, 239 Mo., *t. c.* 140;
State *ex rel.* Fidelity Phenix Ins. Co. v. Barnett,
239 Mo. 193;
St. Louis, Etc., Ry. Co. v. McBride, 141 U. S. 127;
Western Loan & Savings Co. v. Butte & Boston
Consolidated Mining Co., 210 U. S. 368;
Texas & Pac. Ry. Co. v. Cox, 145 U. S., *t. c.* 603;
Thames & Mersey Ins. Co. v. U. S., 237 U. S. 19;
Sugg v. Thornton, 132 U. S. 524.

II.

The right of an insurance company to do business in the State of Missouri is not derived from the Federal Constitutions; such companies are not engaged in interstate commerce and hence it is within the power of the State to determine for itself the conditions upon which such foreign corporation may do business within its limits.

State of South Carolina *ex rel.* Phoenix Mutual
Life Ins. Co. v. McMaster, 237 U. S. 63;

Security Mutual Life Ins. Co. v. Prewett, 202 U. S. 246;
Hooper v. California, 155 U. S. 648.

III.

By a long line of decisions of this court, it is held that a corporation of one State doing business in another State is suable on a transitory cause of action in the courts of the United States established in the latter State and in the manner provided by the laws of the State, without regard to the residence of the parties or the place where the cause of action accrued.

N. E. Mutual Life Ins. Co. v. Woodworth, 111 U. S., *l. c.* 146;
Equitable Life Assurance Soc. v. Brown, 187 U. S. 308;
Barrow S. S. Co. v. Kane, 170 U. S. 100;
Cosmopolitan Mining Co. v. Walsh, 193 U. S. 460, 472;
Phila. Fire Assn. v. New York, 119 U. S., *l. c.* 123;
Lafayette Ins. Co. v. French, 18 How. 404;
New York, L. E. & W. R. R. Co. v. Estill, 147 U. S. 591;
Railroad Co. v. Koontz, 104 U. S. 5, 10;
Railroad Co. v. Harris, 80 U. S. Rep. (12 Wall.) 65;
Pennoyer v. Neff, 95 U. S. Rep. 714;
Dennick v. Central R. Co., 103 U. S. 11;
Ex Parte Schollenberger, 96 U. S. Rep. 369;
St. Mary's Petroleum Co. v. West Va., 203 U. S. 183;
St. Clair v. Cox, 106 U. S. 350, 345.

IV.

With equal unanimity, the several states of the Union

have held that a non-resident may sue a foreign corporation legally doing business in a State other than its home State, even though the contract in suit was made outside of the State and the cause of action accrued outside of the State where the suit is brought, and that in such cases jurisdiction may be obtained without violating any constitutional rights by serving upon an agent appointed by the corporation.

- South v. Continental Casualty Co. (Ky.), 185 S. W. 858;
- Barnes v. Union Central Life Ins. Co. (Ky.), 182 S. W. 168;
- Patton v. Casualty Co., 119 Tenn. 364, 372, 104 S. W. 305;
- Eingartner v. Illinois Steel Co., 94 Wis. 70, 59 Am. St. Rep. 859, 68 N. W. 664;
- Ramansway v. Hammond Lumber Co. (Or.), 152 Pac. 223;
- Brewing Co. v. Gates (Md.), 83 A. 570;
- Reeves v. Southern R. Co., 121 Ga. 561, 70 L. R. A., 4. c. 518;
- Johnston v. Trade Ins. Co., 132 Mass. 43;
- Knight v. West Jersey R. Co., 108 Pa. 250, 56 Am. Rep. 200;
- Tuchband v. C. & A. Ry. Co., 115 N. Y. 437, 22 N. E. 360;
- Mutual L. Ins. Co. v. Nichols (Tex. Civ. App.), 24 S. W. 911;
- Gardner v. Thomas, 14 Johns. 134, 7 Am. Dec. 445;
- Lathrop v. Commercial Bank, 8 Dana 114, 33 Am. Dec. 481;
- Gibbs v. Queen Ins. Co., 63 N. Y. 114, 20 Am. Rep. 513;
- Curtis v. Bradford, 33 Wis. 190;
- Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 22 So. 53;

- Nelson v. Chesapeake & O. R. Co., 88 Va. 971,
15 L. R. A. 583, 14 S. E. 838;
Western Union Tel. Co. v. Clark, 14 Tex. Civ.
App. 563, 38 S. W. 225;
Emmerson v. McCormick Mach. Co., 51 Mich.
5, 16 N. W. 182;
Hawkins v. Fidelity, Etc., Co., 123 Ga. 722, 51 S.
E. 724.

V.

The Supreme Court of Missouri holds that when the Insurance Company executed its power of attorney, took out a license to do business in Missouri, and was actually "doing business" in that State, that for the purpose of service it had a domicil in the State of Missouri, and this holding is in accord with the decisions of this Court where the same facts were involved.

- State *ex rel.* v. Grimm, 239 Mo., *l. c.* 166, 143 S.
W. 492;
Meyer v. Ins. Co., 184 Mo., *l. c.* 486, 83 S. W. 479;
Head v. Insurance Co., 241 Mo. 403;
Curfman v. Deposit Co., 167 Mo. App. 507;
Crutsinger v. Missouri Pac. R. Co., 82 Mo. 64;
Harding v. Chicago, Etc., R. Co., 80 Mo. 659;
Slavens v. South. Pac. R. Co., 51 Mo. 308;
Painter v. R. Co., 127 Mo. App. 248, 104 S. W.
1139;
Commercial Bank of Augusta v. Sandford, 103
Fed. 98, 103;
In re Keasbey, 160 U. S. 221, 228;
Washington-Virginia Ry. Co. v. Real Estate Tr.
Co., 238 U. S. 185;
Juckett v. Brennaman (Neb.), 157 N. W. 925.

VI.

A person may by his acts or omission to act waive a

right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action is not a Federal one.

Eustis v. Bolles, 150 U. S. 361;

Pierce v. Somerset Ry. Co., 171 U. S. 641, 648;

Rutland R. Co. v. Central Vt. R. Co., 159 U. S. 630;

Moran v. Horsky, 178 U. S. 205;

Pittsburgh & L. A. I. Co. v. Cleveland Min. Co., 178 U. S. 270, 279;

Belas v. Cone, 188 U. S. 184;

Schaefer v. Werling, 188 U. S. 516;

Gaar, Scott & Co. v. Shannon, 223 U. S. 468;

Chesapeake & Ohio Ry. Co. v. McDonald, 214 U. S. 191;

Preston v. City of Chicago, 226 U. S. 447.

VII.

Where a constitutional provision is designed for the protection solely of the property rights of a citizen it is competent for a party to waive the protection and to consent to such action as would be invalid if taken against his will, and the insurance company, by filing its power of attorney, applying for and accepting license from the State of Missouri, and doing business in the State of Missouri, most effectually waived any constitutional objection it otherwise might have to the statute in question.

Ashley v. Ryan, 153 U. S. 436;

Grand Rapids & Indiana Ry. Co. v. Osborne, 193 U. S. 17, *l. c.* 29;

Interstate Ry. Co. v. Mass., 207 U. S. 79, 12 Ann. Cas. 555;

Daniels v. Tearney, 102 U. S. *l. c.* 421;

- In re Standard Oak Veneer Co.*, 173 Fed. 103;
Pullman Co. v. Kansas, 216 U. S. 56, *l. c.* 65;
Clay v. Smith, 3 Pet. 411;
Chicago, R. I. Ry. Co. v. Zernicke, 183 U. S. 583;
Musco v. United Surety Co., 196 N. Y. 459, 90
N. E. 171;
Shepard v. Barron, 194 U. S. 553;
Hale v. Lewis, 181 U. S. 473;
Mayor of N. Y. v. Manhattan Ry. Co., N. Y. Ct.
App., 37 N. E. 494;
Mellen Lumber Co. v. Industrial Com. (Wis.),
142 N. W. 187-9;
People v. Rosenheimer, 209 N. Y. 115, 46 L. R. A.
(N. S.), *l. c.* 981;
De Noma v. Murphy (S. D.), 133 N. W. 703;
Hine v. Morse, 218 U. S., *l. c.* 511;
Slate v. Boston & M. R. R. (N. H.), 74 Atl. 542;
Michigan Trust Co. v. Ferry (C. C. A., 8th Cir.),
175 Fed., *l. c.* 674;
Murphy v. Consolidated Ry. Co. (Mass.), 85 N.
E. 507;
State v. Portland Electric Co. (Or.), 95 Pac. 722-
732.

VIII.

Although a record may present in form a Federal question, a motion to dismiss will be allowed where it plainly appears that the Federal question is of such an unsubstantial character as to cause it to be devoid of all merit and therefore frivolous.

- Deming v. Carlisle Packing Co.*, 226 U. S. 102;
*Bankers' Mut. Casualty Co. v. Minneapolis, St.
P. & S. S. M. Ry. Co.*, 192 U. S. 371;
Spies v. Illinois, 123 U. S. 131, 166;
Brooks v. Missouri, 124 U. S. 394;

New Orleans Waterworks Co. v. Louisiana, 185
U. S. 336;

Swafford v. Templeton, 185 U. S. 487, 493;
Wabash R. Co. v. Flannigan, 192 U. S. 29, 38.

IX.

The federal questions presented in the case at bar have been so explicitly foreclosed by prior decisions as to afford no basis for a writ of error under section 709, and the rule to that effect is applicable.

Leonard v. Vicksburg, Etc., R. Co., 198 U. S. 416;

King v. Mullins, 171 U. S. 404;

King v. West Virginia, 216 U. S. 92;

Kansas v. Bradley, 26 Fed. 289, 290;

Western Union Tel. Co. v. Ann Arbor R. Co., 178
U. S. 239;

Kentucky v. Louisville Bridge Co., 42 Fed. 241;
People of State of California v. Brown's Valley
Irr. Dist., 119 Fed. 535;

Arkansas v. Choctaw & M. R. Co., 134 Fed. 106;

Myrtle v. Nevada, C. & O. Ry. Co., 137 Fed. 193;

Harris v. Rosenberger, C. C. A., 145 Fed. 449.

ARGUMENT.

(1) *The Courts of Missouri have jurisdiction over causes of action arising outside of that State between non-residents, and in such cases service of process upon an agent voluntarily appointed by a foreign insurance company doing business in the State is sufficient notice and constitutes due process of law.*

The proposition for consideration in this case is entirely different from the proposition considered in *Insurance Co. v. Morse*, 20 Wall. 445, and cases of that type. The instant case does not involve a right under the Federal Constitution. It does not involve the question that a State cannot constitutionally require a corporation to consent in advance to waive a right arising under the **Federal Constitution** such as the right to remove to a Federal Court. To do business in Missouri is a mere permissive privilege—not a right; certainly not a right given to the Insurance Company by any provision of the Federal Constitution. The Insurance Company, therefore, was not required to contract away any of its rights; it was operating under a license which the State had a right to grant or refuse absolutely and said license was subject to change at the will of the State (*Mutual Life Ins. Co. v. Spratly*, 172 U. S., *l. c.* 620-1); *State ex rel. v. Vandiver*, 222 Mo., *l. c.* 237.

The meaning of the State statute has been settled by the Supreme Court of Missouri. That court holds the statute authorizes suits to be brought against a foreign insurance company "doing business" within the State upon a cause of action arising outside of the State, whether owned by a person or corporation domiciled

outside or inside of the State. It has been judicially determined that this is the condition which the State of Missouri requires the foreign insurance company to consent to before said State will permit it to do business within its boundaries.

The construction placed upon the law by the highest court of the State of Missouri is conclusive on this Court and the only question here is whether the law, as construed, is valid (*Hall v. DeCuir*, 95 U. S. 485; *Louisville, Etc., R. Co. v. Mississippi*, 133 U. S. 587).

Mere possibility of evil, abuse, or hardship, is not sufficient to invalidate statute (*American Land Co. v. Zeiss*, 219 U. S. 47).

The right to sue a foreign corporation in a State other than the State in which the plaintiff resides and the cause of action accrues is a very substantial right and imposes no hardship upon the party sued. The property of corporations can be transferred from one State to another most readily. It is common knowledge that in California after the great earthquake suitors were confronted with such condition and it is not unreasonable that it might follow internal troubles such as strikes and labor troubles in Colorado. If the creditor is compelled to sue in the State where the cause of action arose, he may be confronted with inability to realize on the judgment for lack of sufficient property in that State, and in order to realize on his judgment he must go to some other State where property can be found. If the contention of the Insurance Company be correct, the creditor cannot sue by summons in the State in which property may be found for the reason the cause of action did not accrue there and plaintiff did not reside there, and it would be a violation of the Constitution to permit service to be had upon an

agent. If we follow this contention to its logical conclusion, it results in depriving a foreign creditor of a right to collect his judgment. If this doctrine obtains, it is questionable whether or not a suit by attachment could be maintained (See case below, 184 S. W. 999).

And certain it is (if defendant's theory be sound) that an ordinary suit by summons only could not be maintained and a personal judgment could not be obtained by a non-resident upon a foreign cause of action, whether the cause of action was in the form of an original claim or a **judgment**. It appears palpably plain that such construction is contrary to the spirit, purpose and intent of the Federal Constitution, and this Court has held that a State law giving preference to local creditors of a foreign corporation over non-resident creditors is unconstitutional. *Blake v. McClung*, 172 U. S. 239.

And it has been repeatedly held by this Court that a non-resident person may sue another on a cause of action arising outside of the State where the suit is brought, and can realize upon his debt by the process of garnishment (*Harris v. Balk*, 198 U. S. 215; *Baltimore & O. R. R. Co. v. Hostetter*, 240 U. S. 620).

The Legislature, being familiar with local conditions, is primarily the judge of the necessity of such enactments. The mere fact that a court may differ with the Legislature in its views of public policy, or that the judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference (*Williams v. Arkansas*, 217 U. S. 79).

This Court will, of course, follow the State Court as to the State Constitution (*Waters Pierce Oil Co. v. Texas*, 177 U. S. 28, *l. c.* 43), and assume that the law

is not invalid under that. The question presented is whether, if the State Constitution undertakes to authorize such a law, it encounters the Constitution of the United States. It is a question of the power of the State as a whole (*Missouri v. Dockery*, 191 U. S. 165, 171). But the State has power to exclude insurance companies altogether, if it sees fit (*State ex rel. Phoenix Ins. Co. v. McMasters*, 237 U. S. 63); and that being so, it has power to admit them conditionally (*Rippey v. Texas*, 193 U. S. 504, 509), and one of the conditions upon which a foreign insurance corporation may be admitted to do business within the State of Missouri is that it consent to be sued in its courts on any cause of action arising within or without the State.

The State has full control over the procedure in its courts, so long as such procedure does not work a denial of fundamental rights, or conflict with specific and applicable provision of the Federal Constitution (*Ex parte Reggel*, 114 U. S. 642; *Iowa, Etc., v. Iowa*, 160 U. S. 389; *Chicago, B. & Q. Co. v. Chicago*, 166 U. S. 226). Subject to these two fundamental conditions, this Court has sustained all State laws, whether statutory or judicially declared, regulating procedure and held them to be consistent with due process of law (*Twining v. New Jersey*, 211 U. S. 78; *Jordan v. Commonwealth*, 225 U. S. 167; *American Land Co. v. Zeiss*, 219 U. S. 47; *Standard Oil Co. v. Missouri*, 224 U. S. 270; *Jacob v. Roberts*, 223 U. S. 261; *Simon v. Craft*, 182 U. S. 427).

The Fourteenth Amendment does not undertake to control the power of a State to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted gives reasonable notice and fair opportunity

to be heard before the issues are decided (*Burtado v. California*, 110 U. S. 537; *In re Debs*, 158 U. S. 564; *Iowa Central v. Iowa*, 160 U. S. 389; *L. & H. R. R. Co. v. Schmidt*, 177 U. S. 230). It does not affect or control forms or procedure in State courts and its requirement of due process is fully met and satisfied, provided that the person affected has had sufficient notice and adequate opportunity to defend (*Brown v. New Jersey*, 175 U. S. 172; *Murphy v. Massachusetts*, 177 U. S. 163; *Bolin v. Nebraska*, 176 U. S. 83).

That the statute in question gives sufficient notice and adequate opportunity to defend is clearly apparent, as we shall hereafter demonstrate. It does not discriminate between domestic and foreign insurance companies. They stand equal before the law.

In *State ex rel. v. Grimm*, 239 Mo. 138, the Supreme Court of Missouri held that under the Constitution of the United States the right to sue and defend in the courts of this State must be allowed to the citizens of any other State to the precise extent that it is allowed to citizens of this State. The courts of Missouri are open to all citizens of another State to sue upon any valid transitory cause of action upon which a citizen of this State might maintain a cause of action, and the same doctrine was announced in the present case below (184 S. W. 999) and many others.

In so holding, the Supreme Court of Missouri, it appears, follows the doctrine frequently announced by this Court.

In *Chambers v. Baltimore & Ohio R. R.*, 207 U. S. 142, 148, this Court says:

“But, subject to the restrictions of the Federal Constitution, the State may determine the limits of

the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The State policy decides whether and to what extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies and the same State may have different policies at different times."

It is the common law of Missouri, that a common law right of action, or a statutory right of action, may be enforced in this State where both the plaintiff and the defendant are non-residents and the cause of action arose outside of the State (*St. Joseph F. & M. Ins. Co. v. Leland*, 90 Mo. 177, 59 A. R. 9; *Lee v. Mo. Pac.*, 195 Mo. 400; *Coleman v. Lucksinger*, 224 Mo. 1; *State ex rel. v. Sale*, 232 Mo. 166).

Where the State puts all domestic corporations and all foreign corporations coming into the State, on the same footing in respect of the service of process, and the law operates on all these alike, such a classification is reasonable and not open to constitutional objection (*St. Mary's Franco-American Petroleum Co. v. West Virginia*, 203 U. S. 183, 191; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 563), and it is settled in Missouri (*Head v. Ins. Co.*, 241 Mo. 403) that in the conduct of the business under the license granted by this State, foreign insurance companies "shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers."

Corporations affected by such laws are divided into two classes: (1) the expressly consenting class, and (2) the non-consenting class. The Insurance Company in

the case at bar is one of the "**expressly consenting**" class because it executed its power of attorney and applied for, received and retained its license and engaged in business in the State by virtue of the State's permission "first had and obtained". Cases applicable to the non-consenting class are, therefore, not in point in the case at bar. Cases holding substituted service good on the non-consenting class are bottomed upon the doctrine of consent, implied contrary to intent and this type of consent arises from an **estoppel** in favor of persons doing business with the corporation **within the State**, on the assumption it was legally licensed to do business therein. The *situs* of the cause of action and the residence of the party in **such cases** are material elements constituting such estoppel. But in the case at bar we are dealing with a situation where the **complaining party has voluntarily agreed** that service of process on its agent voluntarily appointed should be deemed personal service on itself on "any" cause of action, and hence the complainant must show that the law attacked is unconstitutional as applied to **one in its class**. It is well settled that one who would strike down a State statute as violative of the Federal Constitution must bring himself by proper averments and showing within the **class** as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him and so operates as to **deprive him of rights protected by the Federal Constitution** (Standard Stock Food Co. v. Wright, 225 U. S. 540; Southern R. Co. v. King, 217 U. S. 524; Tyler v. Judges, 179 U. S. 405; Collins v. Texas, 223 U. S. 288).

That a State has the right to require a foreign corporation to appoint an agent for the purpose of service

is settled by many decisions. It has been held that a law which requires a foreign corporation to appoint an agent upon whom process may be served, as a condition precedent to its right to transact business within the limits of a State is valid and binding (*Wilson v. Seligman*, 144 U. S. 41, 45, 12 Sup. Ct. 541; *Insurance Co. v. French*, 18 How. 404; *Ex parte Schollenberger*, 96 U. S. 369, and other cases cited herein in support of points III and IV.

An early and well-considered case (*Ex parte Schollenberger*, 96 U. S. 369) sustained the validity of a statute of Pennsylvania prohibiting any foreign insurance company from doing business within that State until it has filed with the Insurance Commissioner a written stipulation consenting that legal process served on the Insurance Commissioner should have the same effect as if served personally on the company within this State. The Court held that the condition imposed by the statute is not an unreasonable one, did not violate the Federal Constitution, and that, the defendant having its business in Pennsylvania and having agreed that it might be "found" in Pennsylvania for the purpose of the service of process, it was bound by service in accordance with the statute, and in that case the Court said:

"Under such circumstances, it seems clear that it may, for the purpose of securing business, consent to be 'found' away from home, for the purposes of suit as to matters growing out of its transaction. The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If

the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

The State of West Virginia enacted a law declaring that the Auditor should be the "attorney in fact for and on behalf of every foreign corporation doing business in this State and of every non-resident domestic corporation."

To test the constitutionality of this provision a Petroleum Company refused to comply with its requirements, and thereupon the State sued out a writ of *mandamus* from the Supreme Court of Appeals to require it to do so. This writ was granted and the constitutionality of the act upheld (*State v. Petroleum Co.*, 58 W. Va. 108, 1 L. R. A. [N. S.] 558, 112 Am. St. Rep. 951). From this decision a writ of error was sued out to this Court and the State court's decision was affirmed in the case of *St. Mary's Petroleum Company v. West Virginia*, 203 U. S. 183. The question of the constitutionality of such statute was directly before the court in that case. Mr. Chief Justice Fuller, in speaking for the Court, among other things, said:

"The State had the clear right to regulate its own creations, and, *a fortiori*, foreign corporations permitted to transact business within its borders."

And the Court held that the statute making the State Auditor attorney in fact to accept process was not unconstitutional.

Construing a statute of the State of Missouri, Sec. 7992, which authorizes persons to sue insurance companies not authorized to do business in Missouri by serving on one who settles losses, in *Commercial Mutual*

Accident Co. v. Davis, 213 U. S. 245, 255, this Court said:

"The law of the State may designate an agent upon whom service may be made, if he be one sustaining such relation to the company that the State may designate him for that purpose, exercising legislative power within the lawful bounds of due process of law. This was held in effect in Connecticut Mutual Life Insurance Company v. Spratley, 172 U. S. 602."

In Doyle v. Continental Ins. Co., 94 U. S. 535, the Court had under consideration a statute of Wisconsin, which enacted that if a foreign insurance company should remove any case from its State Court into the Federal courts, it became the duty of the Secretary of State to cancel its license to do business within the State. The Court upheld such statute because the complainant had no constitutional right to do business in that State, and said:

"No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed, and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this Court",

and to the same effect are the later cases, of which the Prewett case (202 U. S. 246) is a type.

In Horn Silver Mining Co. v. New York, 143 U. S. 305, it is said:

"Having the absolute power of excluding the foreign corporation, the State may, of course, interpose such conditions upon permitting the corpora-

tion to do business within its limits as it may judge expedient."

And the Court adds this statement, vitally significant here:

"This doctrine has been so frequently declared by this Court that it must be deemed no longer a matter of discussion if any question can ever be considered at rest."

In considering a case like the one at bar, this Court held that

"the absolute power of the State is the determining factor and the validity of the condition is immaterial" (216 U. S., *l. c.* 66).

Chief Justice White, in his concurring opinion in Pullman Co. v. Kansas, 216 U. S. 56-65, speaking of the State's absolute power to exclude foreign corporations, says:

"When, therefore, in a case where the absolute power to exclude obtains, a condition is affixed to the right to come into the State and a foreign corporation avails of such right, it may not assail the constitutionality of the condition because by accepting the privilege it has voluntarily consented to be bound by the condition."

From the foregoing it clearly appears that the State was within its constitutional rights in passing the law requiring the insurance company to appoint an agent to receive service. Such appointment was voluntarily made without duress and without requiring the insurance company to surrender any right under the Constitution of the United States.

This being true, the only question remaining is: Did the service upon such agent give the defendant "reasonable notice and fair opportunity to be heard"? This question has been so often adjudicated that it must be determined as settled beyond controversy. That notice to an agent voluntarily appointed, under the circumstances appearing here, is notice to the defendant and that it had a fair opportunity to be heard appears beyond question, and the defendant appeared and made every defense that the ingenuity of its counsel could suggest.

We, therefore, confidently assert that there is no issue in this case involving the "due process" constitutional provision, and, as part of our argument, expressive of our views, we quote from the Supreme Court of Missouri in the case below (184 S. W., *l. c.* 1013), where it is said (Transcript of Record, p. 297):

"The contention is that such legislation would do violence to Section 30, Article II, of the Constitution of Missouri, and Section 1 of the Fourteenth Amendment of the Constitution of the United States, known as the 'equal rights' and 'due process' clauses of those beneficent instruments. If this contention is true, such a ruling would be no less novel than astounding. In the light of the constitutional provisions just referred to, and others to be presently mentioned, and those of similar import contained in the Constitutions of the various States of the Union, also in the light of the numerous other statutes of this and those States enacted in pursuance thereof, giving force and effect to them, as well as the common law governing transitory actions, coupled with innumerable decisions of the courts of last resort of the various States and those of the Supreme Court of the

United States, it seems to me that the mind which discovered the pregnable point here contended for, hidden behind such a barricade of constitutional provisions, legislative enactments, common-laws rules and judicial decisions, possessed a keener perception for the discovery of the vulnerable points in our jurisprudence than any of the great military geniuses of the world has ever possessed for the discovery of the weak positions in the enemy's position, and was more daring and self-reliant in his attack than any of the bold knights mentioned in the *Legends of the Rhine.*"

2. That service in such cases on an agent voluntarily appointed is not void or in violation of the Constitution of the United States and that objection to such service in nowise involves the construction or application of the Federal Constitution has been finally settled by the previous decisions of this Court.

That a foreign corporation may be sued in the courts of Missouri upon a cause of action arising outside of the State has been many times determined, and was specifically decided by this Court in *New York Railroad Company v. Estill*, 147 U. S. 591. This was an action commenced in the State court against the New York, Lake Erie & Western Railroad Company, a railroad corporation of a State other than Missouri. In that action the plaintiff sought to recover damages for injuries received by cattle while in transit at Nankin, Ohio. The case was removed by the defendant to the Federal Court, and the defendant filed a motion in the United States Circuit Court to quash the writ of summons issued to the Sheriff of the City of St. Louis and the return of that officer thereon, on the ground that the writ and return were void and conferred no juris-

diction over the defendant, because it was a foreign corporation and that the cause of action sued on did not accrue in the State of Missouri. The motion was overruled and in due course the case was heard in this Court, where the statutes and Constitution of Missouri were considered and construed. Suit was brought by attachment, but no property was levied upon, and hence it stood as if it had been instituted by summons alone. The holding of this Court on the above state of facts is thus correctly summarized in the head notes of the case:

“In Missouri a non-resident corporation which has a business office and an agent in the State is amenable to the jurisdiction of its courts; and service of a summons upon it in the manner provided by the statutes of the State has the effect of personal service and gives the courts jurisdiction to enter a general judgment.

“In Missouri, when all the defendants are non-residents of the State, suits may be brought in any county, and the court of one county may send its summons to any other county for service.

“A foreign corporation doing business in the State of Missouri is a non-resident and, under Section 3481 of the Revised Statutes of that State, is suable in any county and service of summons may be made on its agent.”

The Court, among other cases, cited and relied upon *Lafayette Ins. Co. v. French*, 18 How. 404, wherein it was held that an insurance corporation chartered by the State of Indiana, which was allowed by the law of Ohio to transact business in the latter State upon the condition that service of process upon the agent should be considered as service upon the corporation itself,

was bound by a judgment against it obtained by means of such process in the courts of Ohio.

Barrow Steamship Co. v. Kane, 170 U. S. 100, 105, was an action brought in the Circuit Court of the United States for the Southern District of New York against the Barrow Steamship Company, by a passenger on one of its steamships on a voyage from Ireland to New York, for an assault upon him by its agents in the port of Londonderry in Ireland. It appeared that the plaintiff was a citizen and resident of the State of New Jersey; and the defendant a corporation, organized and incorporated under the laws of the United Kingdom of Great Britain and Ireland, and a common carrier running a line of steamships from ports in that kingdom to the port of New York; and that it was business in the State of New York, through a mercantile firm, its regularly appointed agents, and upon whom the summons in the action was served.

It was contended, in behalf of the steamship company, that, being a foreign corporation, no suit could be maintained *against it in personam* in this country without its consent, express or implied; that by doing business in the State of New York it consented to be sued only as authorized by the statutes of the State; that the jurisdiction of the courts of the United States held within the State depended on the authority given by those statutes; that the statutes of New York conferred no authority upon any court to issue process against a foreign corporation in an action by a non-resident, and for a cause not arising within the State; and therefore that the Circuit Court acquired no jurisdiction of this action brought against a British corporation by a citizen and resident of New Jersey.

In the Kane case, *supra*, note that all the parties

were non-residents of New York, and the cause of action accrued in Ireland. The New York statutes are similar to Missouri in many respects, with the exception that the legislature of New York has not seen fit to authorize non-residents to bring suit in its own courts, but even this fact did not influence the court to deny jurisdiction, and after a full discussion of the issue this Court ruled in favor of jurisdiction and this, of course, decides that the "due process" clause of the Federal Constitution is not violated by the prosecution of such an action.

Other cases cited under our points and authorities are to the same effect. The rule has been applied to insurance companies situated as the defendant in this case.

The issue was directly presented in the case of *In re Louisville Underwriters*, 134 U. S. 488. The facts involved in that litigation were as follows:

A packet company, a Kentucky corporation, brought suit in the United States courts of Louisiana against a fire insurance company, also a Kentucky corporation, to recover upon a policy insuring a Mississippi River steamboat against the perils of the river. It does not appear from the statement of the case where the loss occurred. The insurance company sued out a writ of prohibition in this Court based upon the contention that it was not subject to suit in the State of Louisiana. The public statutes of Louisiana were similar to the statutes of Missouri and required every foreign insurance company to appoint an agent, and required that the company should file its express consent that service of legal process on the agent so appointed should be as valid as if served upon the company. Service was had upon an agent in New Orleans, which agent was ap-

pointed by virtue of the statute of Louisiana. This Court held that the service was legal and valid, saying, *l. c.* 493:

“In the present case, the libellee had, in compliance with the law of Louisiana, appointed an agent at New Orleans, on whom legal process might be served, and the monition was there served upon him. **This would have been a good service in an action at law in any court of the State or of the United States in Louisiana.** Lafayette Ins. Co. v. French, 18 How. 404; *Ex parte* Schollenberger, 96 U. S. 369; New England Ins. Co. v. Woodworth 111 U. S. 138, 146. And no reason has been or can be suggested why it should not be held equally good in admiralty.”

In *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, it was held that, although a Federal question has been explicitly raised below, if such claim be frivolous or has been so absolutely foreclosed by previous rulings of this Court as to leave no room for real controversy, a motion to dismiss will prevail. This was said in a case where a New York life insurance corporation did business in Hawaii and, under statutory regulations, was there subject to suit. It delivered a policy in Hawaii to a person there domiciled, which was among the effects of such person in Hawaii of which possession was taken by an administrator appointed by the Hawaiian courts. Suit was brought in Hawaii upon the policy and judgment was recovered and the contention that the policy had its *situs*, for the purpose of suit, solely at the domicile of the corporation (New York) this Court decided was unfounded, and that the claim was so completely foreclosed by prior rulings as to

come within the principle stated in the preceding paragraph. The prior ruling specifically relied upon and cited by the Court was the Woodworth case (111 U. S. 146).

The case of the New England Life Insurance Co. v. Woodworth, 111 U. S. 138, is directly in point here. It was an action upon a life insurance policy issued upon the life of Anne E. Woodworth, who was domiciled at the time the policy was taken out in the State of Michigan, and who died at Seneca Falls, N. Y. She had never been domiciled in the State of Illinois, and had no assets in the State of Illinois, unless the policy of insurance constituted assets. The Probate Court of Champaign County, Illinois, appointed the husband, S. E. Woodworth, administrator of her, and he brought suit in the court of the State of Illinois against the New England Mutual Life Insurance Company, a corporation of the State of Massachusetts. On application of the defendant, the cause was removed to the Federal Court. The said S. E. Woodworth, after the death of his wife, became resident of the County of Champaign and State of Illinois, and had possession of the policy at the time the suit was instituted. On this state of facts, the defendant requested the presiding Judges to rule that the plaintiff, as administrator appointed in Illinois, could not maintain this action in the courts of Illinois. The request was overruled, and the case carried to this court and proceedings were sustained, though the service was upon the defendant by virtue of a statute requiring the defendant to appoint a person upon whom lawful process could be served. In deciding the case, this Court said:

“In view of this legislation and the policy embodied in it, when this corporation, not organized

under the laws of Illinois, has, by virtue of those laws, a place of business in Illinois, and a general agent there, and a resident attorney there for the service of process, and can be compelled to pay its debts there by judicial process, and has issued a policy payable, on death, to an administrator, the corporation must be regarded as having a domicile there, in the sense of the rule that the debt on the policy is assets at its domicile, so as to uphold the grant of letters of administration there. The corporation will be presumed to have been doing business in Illinois by virtue of its laws at the time the intestate died, in view of the fact that it was so doing business there when this suit was brought (as the bill of exceptions alleges), in the absence of any statement in the record that it was not so doing business there when the intestate died. In view of the statement in the letters, if the only personal property the intestate had was the policy, as the bill of exceptions states, it was for the corporation to show affirmatively that it was not doing business in Illinois when she died, in order to overthrow the validity of the letters, by thus showing that the policy was not assets in Illinois when she died.

"The general rule is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found, as this Court has recently affirmed in *Wyman v. Halstead*, 109 U. S. 654. But the reason why the State which charters a corporation is its domicile in reference to debts which it owes, is because there only can it be sued or found for the service of process. This is now changed in cases like the present, and in the courts of the United States it is held that a corporation

of one State doing business in another, is suable in the courts of the United States established in the latter State, if the laws of that State so provide, and in the manner provided by those laws (*Lafayette Insurance Company v. French*, 18 How. 404; *Railroad Company v. Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369; *Railroad Company v. Koontz*, 104 U. S. 5, 10).” (See pages 145, 146.)

In another portion of the opinion the Court says:

“It (defendant) was exclusively a corporation of Massachusetts for the purpose of availing itself of the privilege of removing the suit. Its diversity of citizenship for such purpose may well remain, because it does not desire a trial in the State tribunal. Yet its availing itself of the privilege of doing business in Illinois, and subjecting itself to the liability to be sued in a court in Illinois, with the effect of making the policy assets in Illinois, were voluntary acts, which, though not affecting the jurisdiction of the Federal court, may well be held to give a locality to the debt for the purposes of administration, so that a suit may be brought under such letters in Illinois” (see *Ibid* 147).

A very similar question was presented and decided in *Cosmopolitan Mining Co. v. Walsh*, 193 U. S. 463, The Constitution of Colorado (Art. XV, Sec. 10), which was under consideration in that case, provided that “no foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served”. The statutes of the State required that before a foreign corporation should be permitted to do any business in

Colorado it should make a certificate, signed by its president and secretary, duly acknowledged, and file the same with the Secretary of State and in the office of the Recorder of Deeds in each county in which business was to be carried on, designating the principal place where the business of such corporation was to be conducted in the State, and also naming an authorized agent or agents in the State, residing in the principal place of business of the corporation, upon whom process might be served (Mills' Ann. Stat., Sec. 499). In compliance with the foregoing requirements the mining company, a foreign corporation incorporated under the laws of Maine, filed, on February 10, 1886, a certificate in the office of the Secretary of State of Colorado and in the office of each of the Recorders of Ouray and Cumberland Counties, designating the County of Ouray as the principal place where the business of the corporation was to be carried on, and naming J. M. Jardine as the agent upon whom process might be served.

Actions were brought by attachment in the County Court of Ouray County to recover \$1,250 from the Mining Company and the summons was served upon J. M. Jardine as the agent of the Mining Company. Upon this service judgments were obtained (the defendant not appearing) and the property sold to one Marsh, who obtained a certificate of purchase which he assigned to one Osborne, and in due time Osborne obtained a deed to the property and conveyed it to Walsh, who brought suit against the Mining Company and Jardine to quiet title. Service in the action to quiet title was again had on Jardine as the alleged agent of the Mining Company. In this last case the defendants did not appear and a decree was entered quieting and establishing Walsh's title.

Afterwards the Mining Company brought suit in the U. S. Court for the recovery of the property and in that action it was alleged in substance that prior to the service made upon Jardine, in the actions above referred to, the Mining Company was not doing business in the State of Colorado, and that in those actions no service of process had been made upon it, hence the Colorado courts acted without jurisdiction, and consequently "the plaintiff has been and is being deprived of its property, viz, the property sought to be recovered in this action without notice, hearing, opportunity to be heard, or due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States".

The Court says "the evidence consisted of a certified copy of the statutory designation of Jardine as agent of the Mining Company, judgment records", etc., and objections to this evidence were overruled and, the proof showing that the Mining Company was doing business in Colorado, the trial court sustained the validity of the judgments and held that the title to the property passed to the purchaser's grantee, Walsh, and rendered a decree to that effect. This Court dismissed the writ of error, and said:

"The primary and fundamental contention of the mining company was therefore this and nothing more; that under the circumstances disclosed the service upon the statutory agent was unauthorized either by the law of Colorado or the principles of general law, and hence that it had not lost its title to the property. The claim asserted under the Constitution of the United States was, therefore, merely conjectural and amounted to this only, that if under the law of Colorado or under

the general law the service on the alleged agent was void, that it would be a violation of the Constitution of the United States to give effect to judgments based on such service. * * * The rulings of the Court below as to the admissibility of evidence and its final direction of a verdict involved necessarily deciding that the service upon the agent was valid by the law of Colorado, or the principles of general law applicable thereto, and its action in so doing in nowise involved the construction or application of any provision of the Constitution of the United States."

Cosmopolitan Mining Co. v. Walsh, 193 U. S.,
l. c. 472.

3. The defendant in this case is precluded and estopped from questioning the constitutionality of the laws of the State of Missouri because it voluntarily complied with them, obtained license to transact business in Missouri and did "do business" in Missouri, and obtained thereby great privileges it did not possess and could not claim or enjoy without accepting the conditions imposed upon it by the Missouri laws.

The defendant, as heretofore shown, had no contract or constitutional right to do business in Missouri and in order to do business in this State it was necessary that it comply with the statutes of Missouri. It did comply with them and obtained all the benefits of doing business in that great State and under the law, whether the act regarding service be constitutional or not, the defendant is precluded from contesting its validity because it voluntarily recognized its validity by executing its power of attorney and obtaining license under it. That a party may take the bene-

fits of an unconstitutional law and afterwards plead its unconstitutionality, is a proposition that has been repudiated by the State of Missouri, as well as the Supreme Court of the United States. See *State ex rel. Kinsey v. Messerly*, 198 Mo. 351; *St. Louis v. R. R.*, 248 Mo., *l. c.* 27.

The analogy between this case and the case of *Grand Rapids Ry. Co. v. Osborne*, 193 U. S. 17, is very close and in that case the Supreme Court of the United States said:

“It results from the foregoing that Sims—the purchaser of the railroad property in question at the sale under foreclosure—and his associates could not demand to be incorporated under the statutes of Michigan as a matter of contract right. Possessing no such contract right, they or their privies cannot now be heard to assail the constitutionality of the conditions which were agreed to be performed when the grant by the State was made of the privilege to operate as a corporation the property in question. Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body. *Daniels v. Tearney*, 102 U. S. 415, and cases cited.”

The appellant was licensed to do business in the State after the passage of the act under consideration and the provisions of the act must be treated as a part of its license. Appellant took its license subject to the conditions which the statute imposes upon

it. It accepted the license burdened with the concomitant conditions.

The basic and fatal error in the contention of defendant is that it fails to recognize that the State has the **absolute power** to prevent foreign corporations not engaged in interstate commerce from doing business therein. Chief Justice White, in his concurring opinion in *Pullman Co. v. Kansas*, 216 U. S. 56-65, speaking of the State's power to exclude foreign corporations, and waiving unconstitutionality by receiving benefits under a law, said:

“In cases where this power is absolute the states may affix to the privilege such conditions as are deemed proper, or, without giving a reason, may arbitrarily forbid such corporations from coming in. When, therefore, in a case where the absolute power to exclude obtains, a condition is affixed to the right to come into the state and a foreign corporation avails of such right, it may not assail the constitutionality of the condition because by accepting the privilege it has voluntarily consented to be bound by the condition. In other words, in such case the absolute power of the state is the determining factor and the validity of the condition is immaterial.”

And he quotes from *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164. He then adds this significant statement:

“In addition, the following cases either directly, expressly, or by fair implication, must be taken as sustaining the right of the state, where it has the absolute power to exclude, to affix whatever condition it deems proper to the right of a foreign corporation to come in, and the consequent inabil-

ity of such corporation, after accepting the privilege to assail the constitutionality of the condition" (citing many cases).

Cases illustrating this doctrine are numerous, and many have been delivered by this Court and other courts. Thus in the recent case of Interstate Consolidated Railway Co. v. Commonwealth of Massachusetts, 207 U. S. 79, it was held that a railway corporation taking a legislative charter, subject to all duties and restrictions set forth in all general laws relating to corporations of that class, cannot complain of the unconstitutionality of a prior enacted statute compelling them to transport children attending public schools at half price. This case came to this Court from a superior court of the State of Massachusetts, and the ruling of the state court was upheld.

In 1880, the opinion in Daniels v. Tearney, 102 U. S. 415, 421, was delivered. The Court considered the principle contended for here at length, cited and considered many cases, and announced the rule which has been adhered to in the state and federal courts ever since. The rule so announced is thus expressed by this Court:

"It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect."

In re Standard Oak Veneer Co., 173 Fed. 103, it was held that a foreign corporation, who accepts license to do business in another State, is debarred from urging the unconstitutionality of the laws it agreed to accept. The other cases cited under Point VII, but reiterated the above stated principles and shows their application to many varying states of fact.

4. *The only question here is the validity of the service of process and defendant appeared generally to the action and by such appearance the alleged Federal or constitutional question is eliminated from the case.*

On September 4th, 1911, the defendant filed a "motion to quash writ and return." It was duly signed by counsel and verified by one of them. The substance of said motion, so far as material here, is as follows:

"Now comes the defendant herein and appearing for the purposes of this motion and for the purposes of this motion only, moves to quash the writ herein issued and the return thereof by the Sheriff of Cole County and dismiss the cause for the following reasons, to-wit:

" 'The Circuit Court of Audrain County, and no other court of the State of Missouri, has jurisdiction over the person of the defendant herein, nor over the subject matter of said action.'

"The alleged contract sued upon, and the alleged cause of action in plaintiff's petition, if any, is a contract under the laws of Colorado, and the cause of action arose in the State of Colorado and is local in the State of Colorado.

"The said Frank Blake, the said superintendent of the Insurance Department of the State of Missouri, upon whom service was had in said action, is not an agent for this defendant upon whom process could be served in the alleged cause of action

set forth in plaintiff's petition. Wherefore, this defendant says that this Court has no jurisdiction over the subject of this action nor over the person of the defendant."

"That said petition presents many issues which the defendant, acting on its own behalf, will be compelled to defend against, and there is a large amount of testimony in the way of witnesses and in the way of documentary evidence, all located in the State of Colorado, which this defendant cannot produce in any court of the State of Missouri by judicial process, and for that reason this Court should not take jurisdiction of said cause and cannot have jurisdiction of said cause, and to be allowed to maintain said action in the State of Missouri would be to deprive the defendant * * * of the equal protection of the laws, and is, therefore, in disobedience to Section 1 of Article XIV of the Constitution of the United States."

On September 6, 1911, the Court overruled defendant's "motion to quash writ and return", to which action of the Court defendant saved no exception whatever. The case then was passed to await the decision of the Supreme Court in the case of *State ex rel. Fidelity-Phoenix Insurance Company et al. v. J. D. Barnett*, 239 Mo. 193, and during the regular March Term, 1912, to-wit, on March 4th, the defendant filed its answer, and deposited with the clerk of the court the sum of \$80.05, as tender of premiums and interest paid by the plaintiff (Tr., p. 12)) to the defendant on said policy. The answer sets up want of jurisdiction and the same reasons alleged in the motion to quash, sets up a number of specific defenses, to the merits of the action, and its sixth defense relates to the tender, and is as follows:

"Defendant further says that on the 5th day of October, 1910, in the City of Cripple Creek, in the County of Teller, State of Colorado, this defendant tendered to the plaintiff the amount of premium paid by it on the policy of insurance mentioned in plaintiff's petition, together with interest thereon, to-wit, the sum of seventy-four and 12/100 dollars (\$74.12) principal, and five and 93/100 (\$5.93) interest as a return of the premiums paid by the plaintiff to defendant on the said policy of insurance. That the defendant now pays the same into the said court for the said plaintiff" (Trans. of Rec., p. 18).

Motions (a) to compel plaintiff to file instruments sued on and (b) motion to dismiss for failure to give bond for costs were filed and overruled March 24, 1912 (Trans., p. 19).

An objection to jurisdiction on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by a general appearance (Scott v. Sanford, 19 How. 393; Rhode Island v. Massachusetts, 12 Pet. 657, 718; Toland v. Sprague, 12 Pet. 300; Voorhees v. United States Bank, 10 Pet. 449, 473), and the only question here is did the insurance company so appear to this action as to waive objections to the place where the suit was brought and the mode and manner of service of process?

We submit that under the decision of this Court, as well as the decisions in Missouri, that defendant appeared to this action.

Where, in accordance with his right, a defendant wishes to raise the objection that the court is without jurisdiction over his person, he must, according to the weight of authority and the decisions of this Court

and the decisions of Missouri, limit his appearance to that single question, or he will be deemed to have waived the objection (State *ex rel.* v. Grimm, 239 Mo., *l. c.* 140). In accord with this rule this Court has repeatedly held that the filing of a demurrer, a plea to the merits, unless based solely on the ground of lack of jurisdiction of the person, constitutes a general appearance (Western Loan, Etc., Co. v. Butte, Etc., Min. Co., 210 U. S. 368; Lively v. Pierton, 218 Fed. 401).

Any action on the part of a defendant, except to object to the jurisdiction over his person which recognizes the case as in court, will constitute a general appearance. Thus a party makes a general appearance by objecting to the jurisdiction of the court over the subject-matter of the action, whether the objection is made by a motion or by formal pleading (Spencer v. Court of Honor, 120 Minn. 422, 139 N. W. 815; Summit Lumber Co. v. Cornell-Yale Co., 85 Nebr. 468, 123 N. W. 444; Perrine v. Knights Templars, Etc., Indemn. Co., 71 Nebr. 267, 98 N. W. 841, 101 N. W. 1017). This is illustrated by many cases. In Handy v. Insurance Co., 37 Ohio St. 366, the matter arose on a motion to dismiss for want of jurisdiction of the person and the motion also alleged "want of jurisdiction" over "subject-matter". The Court held that, by asking for the opinion of the Court as to "subject-matter" it waived objection to service. This is the Missouri doctrine (see Grimm Case, 239 Mo., *l. c.* 175). In the present case it is alleged repeatedly in the first motion to quash "that the Court did not have jurisdiction of subject-matter" and prays the Court to "dismiss" case.

In the present case the defendant prayed that the case be dismissed and in the Grimm Case, 239 Mo., *l. c.* 175 (adopted as the opinion in the Barnett Case, 239

Mo. 193), the Supreme Court of Missouri held that such amounted to an appearance, waiving service.

These allegations constitute an appearance under the rules established by this Court.

In Jones v. Andrews, 12 Wall. 329, this Court said (at page 332):

"It is true that as soon as he appeared he moved a **dismissal** of the bill on two grounds, (1) that it did not show such facts in regard to the citizenship or residence of the defendants as to give the Court jurisdiction; (2) that it contained no equity. Whether, if he had made the motion on the **first ground alone** he would have waived his personal exemption, it is not necessary to decide. His **moving to dismiss** for want of equity was clearly a **waiver**, and he was properly required to answer the bill. After this **the question of jurisdiction over the person was at an end**, and the decree of the Circuit Court, dismissing the bill for want of jurisdiction, must be reversed."

The defendant's prayer to **dismiss** is clearly an invocation of the jurisdiction of the Circuit Court, and hence amounts to an appearance and defeats the motion to quash (Handy v. Ins. Co., 37 Ohio St. 366; McKillup v. Hansey, 80 Neb., 264; Dudley v. White, 44 Fla. 264; Bucklin v. Strickler, 32 Neb. 602; Welch v. Ayres, 43 Neb. 326; Teater v. King, 35 Wash. 138; Everett v. Wilson, 34 Colo. 476; Graham v. Tanquerry, 58 Kan. 233).

Another reason found in the motion is that witnesses and testimony could not readily be "produced by judicial process" and the defendant averred for that reason this Court "should not take jurisdiction

of said cause". Such an allegation clearly and unmistakably invokes the jurisdiction of the court and constitutes an appearance.

"It is among the elementary principles of the common law," said this Court (*Voorhees v. U. S. Bank*, 10 Pet. 449, 473), "that whoever would complain of the proceedings of a court must do it in such time as not to injure his adversary by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into court he must do it before he submits to the process adopted. If the proceedings against him are not conducted according to the rules of law and the court, he must move to set them aside for irregularity; or if there is any defect in the form or manner in which he is sued, he may assign those defects specially, and the Court will not hold him answerable, till such defects are remedied. But if he pleads to the action generally, all irregularity is waived, and the Court can decide only on the rights of the parties to the subject-matter of controversy."

Fitzgerald Cons. Co. v. Fitzgerald, 137 U. S. 98, is a leading and oft-cited case. This was an action instituted in the District of Nebraska against a corporation of Iowa. After the defendant had filed a demurrer to the complaint and an answer, challenging the jurisdiction of the Court over the person and subject-matter and the legal sufficiency of the complaint, as well as the merits of the cause of action, and while the case was on trial before a jury, it interposed a plea to the jurisdiction of the Court, asserting want of prior knowledge of the facts upon which it was based, which plea was overruled. Answering an assignment of error upon this ruling, the Supreme Court says:

"These proceedings were taken by defendant after discovering the alleged ground of objection to the service, and there was no action on its part confined solely to the purpose of questioning the jurisdiction over the person. That such jurisdiction resulted under the circumstances admits of no doubt."

This case was followed in *Mahr v. Union Pacific Railway Co.* (C. C.), 140 Fed. 921, and in that case it was held, in effect, that where the defendant, in a motion to quash the service of summons, assigned as reasons for the motion matters going to the subject of the action, to-wit: want of jurisdiction over subject-matter, it amounted to a general appearance, notwithstanding the use of appropriate words which usually attend an appearance intended to be limited and special. This case was affirmed by the Court of Appeals without discussing the jurisdictional question (190 Fed. 699). It was cited, approved, applied and followed by the Supreme Court of Missouri in *State ex rel. v. Grimm*, 239 Mo., *t. c.* 140, which opinion was adopted as the opinion in *State ex rel. Fidelity-Phoenix Ins. Co. v. Barnett*, 239 Mo. 193, which was heard at the same time and in connection with the Grimm case. (See opinion in Barnett Case, 239 Mo. 193.) And said opinion is the law of this case, as declared in it by the State Supreme Court.

The case of *St. Louis, Etc., Ry. Co. v. McBride*, 141 U. S. 127, is directly in point. The record in this case contains no process of service. The first paper filed upon the part of the defendant was a demurrer to the complaint, based upon the grounds that the Court was without jurisdiction of the person of the defendant, that it was without jurisdiction of the subject-matter

of the action, and that the complaint did not state facts sufficient to constitute a cause of action. The demurrer being overruled, a trial was had, resulting in judgment for the plaintiffs. Speaking of this procedure as it pertains to the jurisdiction respecting the person of the defendant, the Court said:

“Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was, not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds: Two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the Court could take jurisdiction, such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought.”

One of the most recent cases announcing the particular principle is that of Western Loan and Savings Co. v. Butte & Boston Consolidated Mining Company, 210 U. S. 368. The action was there instituted neither in the district of the plaintiff nor of the defendant, but the defendant first appeared by filing its demurrer to the complaint, alleging, first, that the Court had no jurisdiction of the subject of the action; second, that the Court had no jurisdiction of the person of the defendant; third, that the complaint did not state facts sufficient to constitute a cause of action; fourth,

that the complaint was uncertain, and, fifth, that the complaint was unintelligible. The Court, however, held that where a diversity of citizenship exists, so that the suit is cognizable in some Circuit Court, the objection to the jurisdiction of the particular court in which the suit is instituted may be waived by appearing and pleading to the merits. In considering whether the defendant had submitted to the jurisdiction of the court, the Court said:

“Judge Hunt, holding the Circuit Court for the District of Montana, in a well-considered opinion, held that inasmuch as the demurrer was interposed upon jurisdictional and other grounds, and was not confined to jurisdiction over the person alone, but reached the merits of the action, the case being one within the general jurisdiction of the court, although instituted in the wrong district, the defendant had waived its personal privilege not to be sued in the Montana district and had submitted to the jurisdiction. In support of his view Judge Hunt cited *Interior Construction & Improvement Company v. Gibney*, 160 U. S. 217; *In re Keasbey & Mattison Company*, 160 U. S. 221; *Ex parte Schollenberger*, 96 U. S. 369; *Central Trust Company v. McGeorge*, 151 U. S. 129; *St. Louis, Etc., R. R. Co. v. McBride*, 141 U. S. 127; *Lowry v. Tile*, 98 Fed. Rep. 817; *Texas & Pacific Railway v. Saunders*, 151 U. S. 105.”

Thereafter the Judge changed his rulings on the authority of *Ex parte Wisner* (*In re Moore* not having at that time come out) and dismissed the case for lack of jurisdiction. On a hearing in this court the first opinion of Judge Hunt was upheld; this Court followed the McBride case, and said:

"This case presents the same question. We are of opinion that the defendant had waived objection to jurisdiction over its person, and by filing the demurrer on the grounds stated submitted to the jurisdiction of the Circuit Court."

In Texas & Pac. Ry. Co. v. Cox, 145 U. S., *l. c.* 603, this Court, discussing this issue, says:

"The defendants not only demurred, but answered, and the second ground of demurrer was that the petition did not set out a cause of action. Under such circumstances they could not thereafter challenge the jurisdiction of the court on the ground that the suit had been brought in the wrong district (St. Louis, Etc., Railway Co. v. McBride, 141 U. S. 127; Fitzgerald Construction Co. v. Fitzgerald, 137 U. S. 98; First Nat. Bank v. Morgan, 132 U. S. 141)."

In Thames & Mersey Ins. Co. v. U. S., 237 U. S. 19, the Government demurred to plaintiff's petition upon the grounds that the Court had no jurisdiction over the defendant or the subject of the action, and that the petition did not state facts sufficient to constitute a cause of action. In discussing the effect of such pleading the Court, *l. c.* 24, 25, said:

"While the Government asserted in its demurrer that it appeared specially, it raised by that pleading not simply the question of the jurisdiction of such a suit against the United States, but also that of the merits, seeking, and thus obtaining, a decision as to the constitutionality of the tax, and hence of the insufficiency of the facts alleged to support a recovery. Such a demurrer is

in substance ‘a general appearance to the merits’ and is a waiver of objection with respect to the district in which the suit was brought (Western Loan Co. v. Butte Mining Co., 210 U. S. 368, 372; St. Louis, Etc., Ry. v. McBride, 141 U. S. 127, 130).”

In Sugg v. Thornton, 132 U. S. 524, a judgment was obtained against a partnership, and a non-resident partner filed a petition to vacate the judgment. The motion to vacate challenged the judgment **on the merits**, and the decision was against him, which was affirmed by the Supreme Court of the State. It was held by this Court that by **such an appearance** the non-resident partner is precluded from questioning the judgment on the ground that the state law providing for **service of process** upon a partnership and non-resident partners is repugnant to the Constitution of the United States.

When a defendant seeks affirmative relief in an answer he invokes the jurisdiction of the Court, and is estopped to question jurisdiction (Merchants Heat. Co. v. Clow, 204 U. S. 286; Chandler v. Citizens' Natl. Bank, 149 Ind. 601, 49 N. E. 579; Thompson v. Greer, 62 Kan. 522, 64 Pac. 48; Lower v. Wilson, 9 S. D. 252, 62 Am. St. Rep. 865, 68 N. W. 545; Austin Mfg. Co. v. Hunter, 16 Okla. 86, 86 Pac. 293; Montague v. Marunda, 71 Neb. 805, 99 N. W. 653.)

The defendant invoked the jurisdiction of the Court and took affirmative action, to-wit, tendering the premium into court and by pleading a sixth defense, in which it averred that “the defendant is ready to pay the same to the plaintiff **and now pays the same** into

the said court for the said plaintiff and in order to keep its tender good".

This defense is in the nature of a cross-action of rescission and unquestionably calls upon the Court to take **some action** which will result in adjudicating that the tender made by the defendant should be adjudged to belong to plaintiff.

In numerous cases, some of which are above cited, it has been held that if the defendant asks for any affirmative relief he will thereby waive the objection, and the Court will have full jurisdiction over his person for all purposes of the trial.

In the Clow Case, 204 U. S. 286, this Court said:

"There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that **when he does become an actor in a proper sense he submits** (De Lima v. Bidwell, 182 U. S. 1, 174; Fisher v. Shropshire, 147 U. S. 133, 145; Farmer v. National Life Association, 138 N. Y. 265, 270). As we have said, there is no question at the present day that, **by answer in recoupment**, the defendant makes himself **an actor**, and to the extent of his claim, a cross-plaintiff in the suit."

The only question here is notice. If the defendant had notice all is valid. It does not appear here, as one complaining of completed proceedings in which he took no part. It was in court from the beginning and on principle and as an original proposition, the status of a party in a court should be defined; he should either appear and go to trial, and accept its incidents and consequences, or else quit the field altogether;

he will not be permitted to occupy in this regard an ambiguous attitude, nor by the way attempted by this defendant, to appear or disappear or reappear, whenever he thinks it advantageous to do so. Such feats, we submit, are not to be tolerated in a court of justice in cases where the only basis for the objection is improper service of process.

A defendant has the right to stand on its motion attacking service of process, and, in all reason and justice, it should be required to stand upon it. If it choose not to do so, and comes into court and contests the plaintiff's case, it ought to be estopped to deny that it did not have notice. To permit such practice bears no good fruit, but its product is the encouragement of frivolous technicalities in the trial of cases, injustice to litigants and long delay in having their right determined.

This view was taken by the court of West Virginia in the case of Chesapeake, Etc., R. Co. v. Wright, 50 W. Va. 653, wherein Judge Dent, in delivering the opinion of the Court in that case, says:

“The purpose of the service of summons is to bring the defendant into court. If he comes voluntarily and presents his case, he obviates the necessity of summons. It is absurd to hold that a defendant is in court to try his case and if the judgment be for him it is valid, while if it be against him it is invalid, for while he is actually in, he is technically out of court. In for his own purpose, but out for all other purposes. It is a trial if he wins, but not a trial if he loses. The provisions of the statute in relation to the service of summons were made for the protection of defendants without notice, and not to enable those with notice to

escape just obligations and defeat the ends of justice."

5. *The State Court in the prohibition proceedings and in the case below held that the defendant appeared to the action, and this is a non-Federal question broad enough to support the State Court's judgment. Final judgment sustaining the jurisdiction was entered in the prohibition case, and that judgment is res adjudicata on the issue of jurisdiction and does not involve a Federal question.*

We insist that the Supreme Court of Missouri has held that the defendant in this case has appeared, and we insist this ruling was made in the identical litigation now before this Court. The question of jurisdiction and appearance has been considered twice in this case by the Supreme Court of Missouri, the first time in the case of *State ex rel. Insurance Company v. James D. Barnett*, Judge, 239 Mo. 193, and on the appeal in the main case, from which this writ of error has been sued out.

In the Barnett case, *supra*, involving jurisdiction, in the case at bar, the Court adopted the opinion in *State ex rel. Grimm*, 239 Mo. 135, and on the final appeal the law, as declared in the Grimm case, *supra*, so far as it relates to the appearance of the defendant, and the waiver of service, remains unchanged and stands as the law governing the question of appearance of the defendant in this action, as declared by the Supreme Court of Missouri, and therefore we insist that the judgment here rested upon a non-federal question broad enough to sustain it, and this Court has no jurisdiction.

As against this proposition, it may be said that the judgment in the other suit (the prohibition proceedings), was neither pleaded nor proved, and no question of its effect can be considered for that reason. The Supreme Court of Missouri and this Court, in cases like this, have the right to examine their own records and take judicial notice thereof, in regard to the proceedings formerly had therein, by one of the parties to the proceedings now before it. The principle permitting it is announced in *Dimmick v. Tompkins*, 194 U. S. 540, 548; *Butler v. Eaton*, 141 U. S. 240, 242; *Craemer v. Washington State*, 168 U. S. 124, 129; *Bienville Water Supply Company v. Mobile*, 186 U. S. 212, 217; *Barker v. Eastman*, 192 Fed. 659; *State v. Homer* (Mo. Sup. Ct.), 155 S. W. 405, *t. c.* 410; *Brokl v. Brokl* (Minn.), 158 N. W. 436; *Arnold v. Hilks* (Colo.), 155 Pac. 316. A court will take judicial notice of a judgment theretofore rendered material to a cause of action whether pleaded or not (*Devine v. Melton*, 170 App. Div. 280, 156 N. Y. Supp. 228). In collateral proceedings connected with the principal case the judgments and orders in the principal case are judicially noticed and *vice versa*. (*In re Jugero*, 140 U. S. 295; *Conlee Lumber Co. v. Meyer*, 74 Iowa, 403, 38 N. E. 117).

In order that the facts upon which this proposition is based may be fully understood by the Court, we emphasize the fact that at the October Term, 1911, fourteen insurance companies, including the **Pennsylvania Fire Insurance Company**, plaintiff in error here, filed in the Supreme Court of Missouri a petition for writ of prohibition. Said petition, among other things, alleged that "on the 6th day of June, 1911, said Mining & Milling Company did, in the Circuit Court of Audrain County,

Missouri, commence an action against each of the foregoing named petitioners, varying in amount from \$1,500.00 to \$15,000.00 upon insurance policies alleged to have been issued to said Mining & Milling Company by each of the petitioners in the State of Colorado on the 5th day of October, 1910". The petition for writ of prohibition also alleged that the plaintiff did cause to be issued a summons in each of said causes and caused said summons to be served on the Superintendent of the Insurance Department of the State of Missouri. The said petition for prohibition set forth the petition filed by the plaintiff against one of said fourteen insurance companies and alleged that the petition filed in each of said causes was identical, except as to the name of the defendant, and that the writ and return was the same in each case. The said petition for writ of prohibition contained the writ of summons in full and also the Sheriff's return in full. Said petition also contained the motion to quash return and dismiss cause and prayed that the Honorable James D. Barnett, Circuit Judge, be prohibited and restrained from trying any of said causes. On the 8th day of September, 1911, a temporary writ of prohibition was granted by Chief Justice Leroy B. Valliant.

James D. Barnett, Circuit Judge of Audrain County, as respondent, made return to said writ of prohibition, admitting the facts substantially as alleged in the petition for prohibition, and in said return alleged that he had been exercising such jurisdiction as he deemed right under the Constitution and laws of the State of Missouri and in obedience to his duties as Judge of the Circuit Court of Audrain County, Missouri, and not

otherwise, and prayed to be hence discharged without day with his costs.

Upon a hearing of said case, the facts were undisputed that the plaintiff in the action sought to be prohibited was a corporation of the State of Arizona and had never obtained a license to do business in the State of Missouri, and it was admitted that the policies of the several insurance companies defendants in said cause in the court below were issued and delivered in the State of Colorado.

This cause was considered along with the case of State *ex rel.* v. Grimm, 239 Mo. 135, and the opinion in the Grimm case was adopted as the opinion in this case (see 239 Mo. 193).

Upon the record as here set out, on the 23rd day of December, 1911, the Supreme Court of Missouri entered a final judgment in the prohibition case, which final judgment is as follows:

“Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the permanent writ of prohibition be denied, and that the preliminary rule heretofore issued be quashed, and that the said respondent recover against the said relators his costs and charges herein expended, and have therefor execution (Opinion filed).”

The opinion in the Grimm case, *supra*, was delivered January 27, 1912, and the opinion in the case growing out of this litigation, to-wit, State *ex rel.* v. Barnett, 239 Mo. 193, delivered on the same day, and for the purpose of showing that all that was said in the Grimm

case was intended to apply to the Barnett case, we quote the opinion in full in the Barnett case, which is as follows:

“The essential facts of this case and the legal principles underlying them, are substantially the same as those involved in the case of State *ex rel.* Pacific Mutual Life Insurance Company v. Grimm, decided by this Court, *in banc*, at the present term, and reported at page 135 of this report. By consent of parties it was submitted on briefs in connection with that case. We have carefully considered this case and have found no fact or principle of law governing the same which leads to a different conclusion from what was reached in that case. We, therefore, deny the peremptory writ of prohibition and quash the preliminary rule heretofore issued.”

In the Prohibition Case (State *ex rel.* v. Barnett, 239 Mo. 193) the Supreme Court of Missouri decided that the Circuit Court had jurisdiction of this particular case. This is a final judgment, and, we think, **conclusive**. The defendant is precluded from litigating the question of jurisdiction again.

When the final judgment was entered in the prohibition case, State *ex rel.* Insurance Companies v. Barnett, *supra*, the insurance companies had a right (if a Federal constitutional question was involved), to have this Court review the decision on writ of error. This is clearly held by this Court in Weston *et al.* v. The City of Charleston, 2 Pet. 449, wherein the question of the right of this Court to review a State Court’s decision in a prohibition case was involved and decided. The insurance companies did not avail themselves of

this opportunity to obtain a review and the decision is therefore final, and it would seem unjust to permit such question to be raised in a subsequent proceeding after the causes of action have been barred by limitations and the claimant subjected to the enormous expense of trial on the merits. The decision of the Supreme Court of Missouri in the prohibition case is "the law of the case" if that phrase has not lost its meaning in our jurisprudence.

As Justice Holmes in *Richardson v. Ainsa*, 218 U. S. 289, *t. c.* 295, said in a very similar case:

"The first error assigned is that the district court was without jurisdiction. That point already has been decided against the appellant in this very case under the name of *Ainsa v. New Mexico & Arizona R. R. Co.*, No. 2, 175 U. S. 91, so that it is not open to him to urge it (*United States v. Camout*, 184 U. S. 572, 574.)"

The identical question here presented came before the Supreme Court of California in *White v. Fresno Nat. Bank*, 98 Calif. 166, 32 Pac. 979. In that case the Court held that where the Supreme Court denies an application for a writ of prohibition by a defendant corporation to prohibit the trial court from proceeding in the action based on the ground it has acquired no jurisdiction, the question of jurisdiction is res adjudicata on appeal by defendant from a subsequent judgment in the principal action.

See, also, *Mt. Vernon Cotton Co. v. Alabama Power Co.*, 240 U. S. 30, holding that the disposition of a prohibition case is a final judgment.

As said in *New Orleans v. Citizens' Bank*, 167 U. S.

371, 398, quoting from and adopting the authorities mentioned:

"No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the reasons upon which it was based were sound or not, and even if no reasons at all were given, the judgment imparts absolute verity, and the parties are forever estopped from disputing its correctness (Cooley on Const. Lim., p. 47 *et seq.*, and authorities there cited).

"'Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to, and certain of reversal in a higher court' (Bigelow Estoppel, 3rd Ed., Outline, pp. lxi, 29, 57, 103)."

6. *The doctrine of the Old Wayne case and the Simon case does not apply here, because in the case at bar the foreign insurance company gave its express consent that service might be obtained on its agent which it voluntarily appointed. In the other cases the foreign corporation had not given either express or implied consent that service might be had on the state officer served.*

The cases relied upon by the Insurance Company, are Old Wayne Life Ass'n v. McDonough, 204 U. S. 8, and Simon v. Southern Ry. Co., 236 U. S. 115. In each of these cases there was judgment by default, in a cause of action arising outside of the state, and service of process was upon an officer designated by statute. In neither of said cases had the complaining

party executed a power of attorney, appointing an agent, and neither case overrules the long line of cases sustaining service upon a foreign corporation which has given its express consent to be sued by executing a power of attorney. It is clear beyond discussion that there was **no express consent** in either the old Wayne or the Simon case, and as we understand said decisions, the Court found, as a fact, that there was **no implied consent or element** of estoppel involved. In the last analysis the holding of those cases is simply this: Where a foreign corporation has **not given its consent, either express or implied**, then service upon an agent designated by statute is not service upon the company.

In the old Wayne case, this Court used this significant language:

“But even if it be assumed that the insurance company was engaged in some business in Pennsylvania at the time the contract in question was made, it cannot be held that the company **agreed** that service of process upon the Insurance Commissioner of that Commonwealth would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania.”

And again, on page 22, the Court says:

“Such **assent cannot** properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania.”

And the old Wayne case, in discussing the doctrine that under certain circumstances the corporation will be deemed to have assented to service upon an agent

designated by statute, the Court clearly indicates that such assent is based upon the doctrine of estoppel and uses this language:

“And it (the foreign corporation) will be estopped to say that it had not done what it should have done in order that it might lawfully enter that Commonwealth and there exert its corporate powers.”

As we understand the theory of implied assent, based upon estoppel, it grows out of the fact that the cause of action originated in the state, because if it did not originate in the state, there is no basis for the estoppel. (See case below, 184 S. W. 1008.)

The idea of estoppel is present in support of the conclusion arrived at in *Hunter v. Mut. Reserve Ins. Co.*, 218 U. S. 573.

The Simon case announces no new principle, but applies the principle announced in the old Wayne case, and holds that there was neither implied nor express consent to the service of process on the state officer. Indeed, in the Simon case this court specially reserved from the decision a case such as the one at bar, where a foreign corporation has executed a power of attorney and obtained a license, and expressly stated that the case was decided

“without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation.”

In the case at bar we are not dealing with implied consent, nor is there any issue of estoppel in the case. We are dealing here with the meaning of a power of

attorney voluntarily made, designating the insurance superintendent as the agent of the insurance company for the purpose of receiving and accepting service. The case at bar proceeds upon the theory that a power of attorney was executed, and the scope and meaning of this power of attorney presents a question of general law. It in no sense presents a federal question. The power of attorney in the instant case has been construed by the Supreme Court of Missouri, and that court has held that said power of attorney contains express consent that the Insurance Commissioner should be an agent of the insurance company with authority to receive and accept service or process in a cause of action such as here presented. We respectfully submit that the scope and meaning of that power of attorney is settled by the decision of the Supreme Court of Missouri.

It is immaterial what induced the company to make and execute this power of attorney. It was not executed under duress, nor is there any plea in this case presenting an issue as to the invalidity of the power of attorney. Let us suppose that no statute had ever been passed and the Insurance Company, desiring to do business in Missouri, had appointed John Doe its agent by a power of attorney, containing the language which appears in the power of attorney given to the Insurance Commissioner. Could it be contended for a moment that it did not constitute John Doe an agent to receive service on behalf of the Insurance Company? And on what theory could it be said that the Company, who executed such a power, could complain that it was deprived of its property without due process of law because service had been had on such agent?

The opinion in the **Simon case** and the Old Wayne case did not turn upon the construction of any power of attorney, but was based upon a fiction of law devised by the courts for the purpose of obtaining jurisdiction against a company which had no intention of conferring jurisdiction upon the courts. There is a marked distinction between the consent implied against the intent of a defendant and the consent evidenced by a formal power of attorney executed by a defendant with the intent of conferring power upon a party to act as its agent. In the case at bar the agency grows out of a writing given by the company to the agent and in the last analysis the question is, Can a company, who has voluntarily by contract appointed one an agent, claim that the appointment is void?

A party who thus obeys a law and receives benefits under it and voluntarily executes a power of attorney appointing an agent is estopped from complaining that there was in existence at the time it voluntarily executed the contract a law which prescribed the form of the contract, because the form was adopted and used without duress.

We do not contend that it is within the power of the state to pass a law which would prevent a foreign corporation from enjoying any of its constitutional rights, but what we do say is that after a corporation has voluntarily and willingly executed a power of attorney, conferring upon a certain person the powers and duties of an agent, it cannot come into court and say that the one so appointed was not its agent. Whether there was or was not any statute requiring an agent to be appointed is immaterial, when the question presented is the scope of the agent's authority. The law did not prohibit the Insurance Company from

establishing this agency. The fact that it did create an agency is not illegal in any sense and before a defendant can raise the constitutionality of the statute it certainly should be required to plead and prove that in some sense or in some way it was coerced into executing the power of attorney. There is not the slightest suggestion in this record that the appointing of the agent was not the free and voluntary act of the defendant.

As said by Judge Learned Hand in *Smolix v. Philadelphia Co.* (D.C.), 222 F. 148:

"The question now is of personal jurisdiction, and that depends upon the interpretation of the consent actually given, an interpretation determined altogether by the **INTENT** of the state statutes. That intent being determined, there is no constitutional objection to a state's exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business. **Intent and power uniting in the sections in question, how is it possible to confine the provision to actions arising from business done within the state? * * ***"

Pointing out the difference between "express" and "implied" consent the Court says:

"The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited, as it has been limited in *Simon v. Southern Railway*, *supra*, and *Old Wayne Insurance Co. v. McDonough*, *supra*. The actual consent in the cases at bar has no such latitudinarian possibili-

ties; it must be measured by the proper meaning to be attributed to the words used, and where that meaning calls for wide application, such must be given."

For the foregoing reasons, we submit the motion to dismiss or affirm should be sustained.

*James J. Quinlan
Patrick Henry Gleeson
Charles M. Shryock*

Attorneys for Defendants in Error.

St. Louis, Missouri, November, 1916.

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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1916.

No. 584.

PENNSYLVANIA FIRE INSURANCE COMPANY, OF PHILADELPHIA, PENNSYLVANIA,

Plaintiff in Error,

vs.

THE GOLD ISSUE MINING & MILLING COMPANY,

Defendant in Error.

*Error to the Supreme Court of the State
of Missouri.*

STATEMENT.

The pertinent facts, upon motion of defendant in error to dismiss or affirm, are these: The action was brought by defendant in error in the Circuit Court of Audrain County, Missouri, upon a standard fire insurance policy to recover for the alleged loss by fire of the insured property. It ap-

pears from the petition (Transcript, pp. 8-10) that the defendant in error is an Arizona corporation, that the plaintiff in error is a Pennsylvania corporation, and that the insured property was located in the State of Colorado. The petition does not show the situs of the contract of insurance. The answer alleges (Transcript, pp. 12-19) and the reply admits (Transcript, p. 19) that the policy was made and executed in Colorado. It appears for the first time in the record that the contract was a Colorado contract, and not a Missouri contract, by the admissions of the reply.

Service of process was attempted to be had by substituted service upon the Insurance Commissioner of the State of Missouri, pursuant to the provisions of Section 7042, Revised Statutes of Missouri, 1909 (Transcript, pp. 11-12), and was the only service had in the case. This section of the Missouri statutes reads as follows: (Transcript, pp. 276-277):

“Sec. 7042. Any insurance company not incorporated by or organized under the laws of this State, desiring to transact any business by any agent or agents in this State, shall first file with the Superintendent of the Insurance Department a written instrument or power of attorney, duly signed and sealed, appointing and authorizing said superintendent to acknowledge or receive service of process issued from any court of record, justice of the peace, or other inferior court, and upon whom such process may be served

for and in behalf of such company, in any court of this state, and consenting that service of process upon said superintendent shall be taken and held to be as valid as if served upon the company, according to the laws of this or any other state. Service of process as aforesaid, issued by any such court, as aforesaid, upon the superintendent shall be valid and be deemed personal service upon such company, so long as it shall have any policies or liabilities outstanding in this State. * * * Every such instrument of appointment executed by such company, shall be attested by the seal of such company, and shall recite the whole of this section, and shall be accompanied by a copy of a resolution of the board of directors or trustees of such company similarly attested, showing that the president and secretary, or other chief officers of such company, are authorized to execute such instrument in behalf of the company; and if any such company shall fail, neglect or refuse to appoint and maintain, within the state, an attorney or agent, in the manner hereinbefore described, it shall forfeit the right to do or continue business in this State."

It will be noted that the quoted section of the statutes makes no provision whatever for the giving of any notice, by the superintendent of the insurance department, to the real party in interest,

sought to be reached by the substituted service, and there is no provision elsewhere in the statutes of Missouri for the giving of any such notice. At the time of such attempted service, plaintiff in error had qualified, under that statute, to do business in Missouri.

Plaintiff in error first appeared specially and filed its motion to quash the writ (Transcript, pp. 126-28) alleging want of jurisdiction and asserting its right to protection under Article I of the Fourteenth Amendment to the Federal Constitution, as well as under the Missouri constitution. The motion to quash being overruled, plaintiff in error again raised its objections to the jurisdiction by incorporating the grounds of its motion to quash as one of the defenses in its answer (Transcript, pp. 12-13). For an additional defense (Transcript, pp. 16-18) plaintiff in error plead the fact that defendant in error was not the unconditional and sole owner of the insured property, and that the subject of insurance was a building on ground not owned by the defendant in error in fee simple; that the policy of insurance contained provision that the policy should be void if the interest of the insured should be other than unconditional and sole ownership or if the subject of insurance was a building on ground not owned by the insured in fee simple. Plaintiff in error further plead the Statutes of the State of Colorado and the judicial decisions of the Supreme Court of that State, showing conclusively that this condition of the policy had been breached, and the policy rendered void on account of failure of defendant in error to comply with the laws of the

State of Colorado relating to qualification of foreign corporations.

Prior to the filing of its answer in this case, plaintiff in error, in a prohibition proceeding instituted in the Supreme Court of Missouri, challenged the jurisdiction of the trial court. In that proceeding plaintiff in error contended that Section 7042, above quoted, should be construed as not to embrace foreign causes of action between nonresidents. The questions there raised were purely questions of construction of the said statute and not questions of its constitutionality. At the time when the prohibition proceeding was before the Court the record did not show all the necessary facts, which were subsequently disclosed by the answer and reply, and upon which the claims of plaintiff in error to protection under the Federal Constitution were grounded. In the prohibition proceedings, the Supreme Court of Missouri contented itself with filing a memorandum decision in which it was stated that the Court found no questions in the case which had not already been raised and passed upon in *State ex rel. v. Grimm*, 239 Mo. 135, l. c. 159; 143 S. W. 483.

Thereafter this case was tried to a jury, which found for defendant in error and judgment was entered upon the verdict (Transcript, pp. 4-5).

Plaintiff in error thereupon appealed to the Supreme Court of Missouri, claiming want of jurisdiction and asserting its right to protection under Section 1 of the Fourteenth Amendment to the Federal Constitution as well as under Section 1 of Article IV thereof.

The case was first heard before the Supreme Court of Missouri in Division (Transcript pp. 269-270), and on account of the failure of a majority of the Court to concur in the opinion, it was ordered that the case be transferred to the Court *en banc*. The opinion of the Court in Division was written by Justice Graves and is the same opinion, with minor changes, which was later filed as the dissenting opinion when the case was decided by the Court *en banc*.

Thereafter the case was argued and submitted to the Court *en banc*, which found against plaintiff in error by a vote of four to three. The majority opinion, written by Woodson, C. J. (Transcript pp. 270-319), was concurred in by three of the remaining six justices. Justices Graves, Bond and Walker dissent in opinion appearing at pp. 319 to 329 of the transcript. The majority opinion contains a lengthy discussion of all the constitutional questions involved in the case, and nowhere in that opinion is there any mention of any ground for the decision other than the constitutional grounds.

The Court did not find that there was any personal service of process upon plaintiff in error, but held that the substituted service under Section 7042, Revised Statutes of Missouri, 1909, was sufficient to confer jurisdiction.

We bring this case to this Court on the claim that the plaintiff in error was, by the Supreme Court of the state, denied rights guaranteed to it under the Constitution of the United States, viz: (1) Due process of law under the Fourteenth Amendment, and (2) full faith and credit was not given to the public acts, records and judicial proceedings of the State of

Colorado, where the property involved was situate and the alleged cause of action first accrued, and if such full faith and credit had been given by the Supreme Court of Missouri, it would necessarily have held that the plaintiff in the Trial Court had no cause of action and have directed a dismissal of the same.

The second ground of Federal jurisdiction, upon which we rely, is wholly disregarded in Motion to Dismiss or Affirm and in counsel's brief supporting the same.

ARGUMENT.

I.

THE SUPREME COURT OF THE STATE IN ITS CONSTRUCTION OF SECTION 7042 R. S. OF MISSOURI, 1909, DENIED TO PLAINTIFF IN ERROR (DEFENDANT IN THE TRIAL COURT) THAT DUE PROCESS OF LAW GUARANTEED TO IT UNDER THE FOURTEENTH AMENDMENT.

In approaching the question of the constitutionality of Section 7042 Revised Statutes of Missouri, 1909, plaintiff in error recognizes that such enactments are necessary and highly beneficial when confined within their proper limits. They are undoubtedly a proper exercise of the police power, in furtherance of the common good and general welfare of the community. But when extended to deprive foreign corporations of that due process of law which is guaranteed by the Fourteenth Amendment, condemnation becomes necessary.

We are not attacking the law as written, but the law as administered and justified by the Supreme Court of the state, and, as so administered and justified, we assert it to be a violation of the Constitution of the United States.

Myles Salt Co. v. Board of Commissioners, 239 U. S. 478.

In support of our contention it seems only necessary to call the attention of the Court to the recent cases of:

Simon v. Southern Railway, 236 U. S. 115.
Old Wayne Mutual Life Association v.
McDonough, 204 U. S. 22.

In their legal aspects the facts in the Simon case, and in the case at bar, are identical in all material respects.

(a) As here, the defendant was a non-resident of the jurisdiction of the forum; (b) as here, the cause of action had its origin and grew out of a transaction which took place outside of the jurisdiction of the forum, and (c) the Statutes of Missouri and Louisiana, under which service was had in each case, are identical in legal import and effect. The only difference is that the plaintiff in the Simon case was a resident of the forum, while here the plaintiff is an Arizona corporation—a difference which, if of any effect, serves only to strengthen the contention of defendant in this case. The foregoing is also true of the Old Wayne case.

In the Simon case the defendant was a Virginia corporation; the injury on which suit was brought in

Louisiana occurred outside of that state, and process was served upon the Secretary of State in accordance with the Louisiana Statute. On these facts this Court held that the service under the Louisiana Statute was not effective to give the Louisiana Court jurisdiction, and that the judgment obtained by Simon was therefore void.

The Court said:

"Subject to exceptions, not material here, every state has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 47 L. Ed. 987, 23 Sup. Ct. Rep. 707; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 603, 43 L. Ed. 569, 19 Sup. Ct. Rep. 308. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts, wherever made, and suits for torts, wherever committed, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might at any

time be carrying on business. The manifest inconvenience and hardship arising from such extraterritorial extension of jurisdiction by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 22, 51 L. Ed. 351, 27 Sup. Ct. Rep. 236, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states.

"In that case the Pennsylvania Statute, as a condition of their doing business in the state, required foreign corporations to file a written stipulation agreeing "that any legal process affecting the company, served on the insurance commissioner * * * shall have the same effect as if served personally on the company within the state." (p. 18.) The Old Wayne Life Association, having executed and delivered, in Indiana, a policy of insurance on the life of a citizen of Pennsylvania (p. 20), was sued thereon in Pennsylvania. * * * Thereafter suit on the judgment was brought in Indiana. * * *

This Court said:

"But even if it be assumed that the * * * company was engaged in some business in Pennsylvania at the time the

contract in question was made, it cannot be held that the company agreed that service of process upon the insurance commissioner of that commonwealth would alone be sufficient to bring it into Court in respect of all business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania (p. 21) * * *. Conceding, then, that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have assented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania * * *. As the suit in the Pennsylvania Court was upon a contract executed in Indiana; as the personal judgment in that Court against the Indiana corporation was only upon notice to the insurance commissioner, without any legal notice to the defendant association, and without its having appeared in person, or by attorney, or by agent in the suit; and as the act of the Pennsylvania Court in rendering the judgment must be deemed that of the state within the meaning of the Fourteenth Amendment, we hold that the judgment in Pennsylvania was not entitled to the faith and credit which, by the Constitution, is required

to be given to the * * * judicial proceedings of the several states, and was void as wanting in due process of law.'

"From the principle announced in that case it follows that service under the Louisiana Statute would not be effective to give the District Court of Orleans jurisdiction over defendant as to a cause of action arising in the State of Alabama. The service on the Southern Railway, even if in compliance with the requirements of act 54, was not that kind of process, which could give the Court jurisdiction over the person of the defendant for a cause of action arising in Alabama."

We have quoted at length from the opinion in the Simon case, as it shows clearly the grounds upon which the Court rested its decision, and furthermore emphasizes what the Court held in the Old Wayne case—"That the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states"—to repeat the exact words of the opinion. How can any language be clearer? This Court itself states that it so held in the Old Wayne case, and reaffirms and reiterates that holding by the Simon case. No amount of legal refinement or attempted distinction can serve to strike down such a clear, direct and positive statement; and the pertinent facts there relied upon of statutory consent, and a foreign cause of action against a foreign corporation, are present in the case at bar.

When the reason for this holding is sought, it

is evident that the Court recognized the hardship and injustice resulting from such an unwarranted attempt to extend the jurisdiction of the Courts of any state in this manner. Witnesses in the state where the transaction occurred cannot be compelled to attend and testify, local conditions differ, and an otherwise beneficial statute is perverted to obtain an unjust advantage.

The Court has said by these cases that the power to designate by statute the officer upon whom service in suits against foreign corporations may be made is constitutionally limited to business and transactions occurring within the jurisdiction of the state enacting the law; in pursuance of the recognized principle that each state is subject to the restrictions of the Federal Constitution in fixing the jurisdiction of its courts.

St. L. I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 285; 52 L. Ed. 1061, 1064.

House v. Mayes, 219 U. S. 270, 282; 55 L. Ed. 213, 218.

Nor is there anything surprising or unusual in this action by the Court when the history of litigation of this nature in this Court is considered. This court in at least three instances, had already expounded its construction of these statutes, and the holding in the Simon case was long ago foreshadowed.

Thus in *Lafayette Ins. Co. v. French*, 18 How. 404; 15 L. Ed. 451, at 452, it is said:

"In this instance, one of the conditions imposed by Ohio was, in effect, that the

agent who should reside in Ohio and enter into contracts of insurance there in behalf of the foreign corporation, should also be deemed its agent to receive service of process in suits founded on such contracts. We find nothing in this provision either (un)-reasonable in itself, or in conflict with any principle of public law. It cannot be deemed unreasonable that the state of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum, upon this important class of *contracts made and to be performed within that state*, and fully subject to its laws; nor that proper means should be used to compel foreign corporations, transacting this business of insurance within the state, for their benefit and profit, to answer there for the breach of their *contracts of insurance there made and to be performed.*" (Italics ours.)

Twenty-six years later the Court again says, in *St. Clair v. Cox*, 16 Otto 350; 27 L. Ed. 222, at 225:

"The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that, *in any litigation arising out of its transactions in the state*, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as

expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it *for business there done*, process shall be served upon its agents, the provision is to be deemed a condition of the permission; * * * Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation."

(Italics ours.)

And lastly, in Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147; 47 L. Ed. 987, at 994, it was said:

"This and other kindred statutes enacted in various states indicate the purpose of the state that foreign corporations engaging in business within its limits shall submit (to) *controversies growing out of that business* to its Courts, and not compel a citizen having such a controversy to seek the state in which the corporation has its home for the purpose of enforcing his claims."

(Italics ours.)

Counsel for defendant in error assumes that plaintiff in error in this case "voluntarily" appointed the Commissioner of Insurance as its agent

for service of process in cases of this nature and argues that the Simon case does not cover that point.

It is submitted, however, that this Court, in the use of the phrase "voluntarily appointed," meant an agent appointed by choice, and not one expressly designated by statute, and a careful reading of the foregoing excerpt from the Simon case supports this contention. The Court specifically states that it is not considering the case where, "an agent is voluntarily appointed," but that it is considering the case where process is "served on an agent designated by a Louisiana Statute." And when this is backed up by the further statement that it is immaterial whether the foreign corporation is doing business in the state, and hence immaterial whether or not the statutory agent is actually appointed by the corporation, it is difficult to see how the Court was considering a case any different from the one in hand where process was served on an agent designated by a Missouri statute.

We append some definitions of the term "voluntary":

"Choice—Produced in or by an act of choice."—Webster's Dictionary.

"Free choice."—Century Dictionary.

"Acting by choice."—40 Cyc. 220.

"Done by choice."—29 A. and E. Enc. 1072.

"Free without compulsion or solicitation."—Black's Law Dictionary, p. 1227.

And in *Western Union Telegraph Co. v. Frear*, 216 Fed. 199, 204; affirmed, 241 U. S. 329, we find this statement:

"But contracts such as those here in question are not between citizens or subjects, but between a political superior and a subject—between the state as a local sovereignty and a citizen or subject of another state. The object of such statutes is public policy. The corporation cannot elect whether it will stay out, being practically coerced to come in by threatened loss of contract and property rights. The parties are by no means on equal terms. One is sovereign, dictating what the subject in these cases lawfully in the state for some purposes, shall do if it remains therein for other purposes closely related. So when the state enacts that, if the subject does something it has a perfect abstract right to do, it shall be punished, it is thereby substantially prohibited."

The lower Federal courts are not in harmony as to the proper construction to be placed upon the holding in the Simon case. Our construction of the opinion in that case is sustained by:

Fry v. D. & R. G. R. Co., 226 Fed. 893;
Takacs v. Phil., etc., R. Co., 228 Fed. 728.

Opposed to the last cited cases is:

Smolix v. Phil. Iron Co., 222 Fed. 148.

II.

PLAINTIFF IN ERROR IS NOT DEPRIVED
OF ITS RIGHT TO ATTACK THE STAT-
UTE IN QUESTION BY REASON OF THE
FACT THAT IT IS A FOREIGN CORPORA-
TION.

Is a foreign corporation, merely by reason of that fact, deprived of its right to attack an act otherwise unconstitutional? It may be true that the state under certain conditions may exclude foreign corporations from its limits entirely. But it does not follow from this that the state may permit or invite foreign corporations to carry on business within its borders, and then impose upon them statutory conditions that are repugnant to the Constitution of the United States. Corporations are necessary to the conduct of the business of the country, and it is somewhat startling to say that by permitting a foreign corporation to carry on business within its limits a state thereby acquires the right to subject such corporation to regulations inconsistent with the supreme law of the land.

As appears from the following statements, the United States Supreme Court has continuously recognized and reaffirmed the principle that a state cannot impose unconstitutional conditions upon foreign corporations.

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. (13 Pet. 519.) This consent may be accompanied by such conditions as Ohio may

think fit to impose; and these conditions must be deemed valid and effectual by other states, and by this Court, *provided they are not repugnant to the Constitution or laws of the United States*, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

Lafayette Ins. Co. v. French, 18 How.
404; 15 L. Ed. 451, 452.

Quoted with approval in St. Clair v. Cox,
16 Otto 350; 27 L. Ed. 222, 225.

"*As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void.* * * * In all the cases in which this Court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it is uniformly asserted that *no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States.* (Citing numerous authorities.)"

Barron v. Burnside, 121 U. S. 186;
30 L. Ed. 915, at 920.

In the case of Hooper v. California, 155 U. S. 648; 39 L. Ed. 297, the Court in considering the power of a state over foreign corporations, said, at page 301:

“The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, *subject, always, of course, to the paramount authority of the Constitution of the United States.*”

And again, in Dayton Coal & Iron Co. v. Barton, 183 U. S. 23; 46 L. Ed. 61, at 64, the Court showed clearly its recognition of this principle:

“We do not care, however, to put our present decision upon the fact that the plaintiff in error is a foreign corporation, nor to be understood to intimate that state legislation, invalid as contrary to the Constitution of the United States, can be imposed as a condition upon the right of such a corporation to do business within the state. (Citing authorities.)

“It has from an early day been held that a corporation created by one state could transact business in another state only with the consent, expressed or implied, of the latter state, and that such consent might be accompanied by such conditions

as the latter state might think fit to impose, provided they were not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state free from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." (Citing many cases.)

Cable v. U. S. Life Insurance Co., 191
U. S. 288; 48 L. Ed. 188, at 194.

In Western Union Telegraph Co. v. Kansas, 216 U. S. 1; 54 L. Ed. 355, the Court was considering the validity of a charter fee imposed by the laws of Kansas, and after reviewing a number of the cases, says, at page 369:

"Can such a regulation be deemed constitutional any more than one requiring the company, as a condition of its doing intra-state business, that it should surrender its right, for instance, to invoke the protection of the Constitution when it is proposed to deprive it of its property without due process of law, or to deny it the equal protection of the laws?"

There are also two very recent cases which remove any possible doubt on this question.

Baltic Mining Co. v. Mass., 231 U. S. 68; 58 L. Ed. 127, at 133, where it is said:

"The right of a state to exclude a foreign corporation from its borders, *so long as no principle of the Federal Constitution is violated in such exclusion*, has been repeatedly recognized in the decisions of this Court, but the right to prescribe conditions upon which a corporation of that character may continue to do business in the state, *unless some contract right in favor of the corporation prevents; or some constitutional right is denied* in the exclusion of such corporation, is but the correlative of the power to exclude. (Citing numerous authorities.) For example, *a state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law;* * * * To allow a state to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union."

And in *So. Carolina v. McMaster*, 237 U. S. 63; U. S. Adv. Ops. 1914, 504, at 506, as late as April 5, 1915, the Court reiterates:

"It was within the power of the state, *so long as it did not impose upon the company as a condition of doing business within the state any deprivation of rights secured to it under the Federal Constitution* to determine for itself the conditions upon which such foreign corporation could do

business within the state. This principle has been often affirmed by the decisions of this Court, and the insurance company, being within that class of companies not doing an interstate business, the state might, in the exercise of its lawful authority, exclude it from doing business within the state, *so long as no rights conferred by the Constitution and laws of the United States were destroyed or abridged.* See *Harrison v. St. Louis & S. F. R. Co.*, 232 U. S. 318, 332, 333; 58 L. Ed. 621, 626, 627; 34 Sup. Ct. Rep. 333, and cases in this court therein cited."

This case stands as the last word of the Supreme Court of the United States on this question, and as it involved the rights of a foreign insurance corporation, it is particularly applicable to the case at bar.

In the face of such an array of authority, the case of *Horn Silver Mining Company v. New York*, 143 U. S. 305; 36 L. Ed. 164, decided in 1891, and cited by defendant in error, must be restricted to the facts on which it was decided; and a perusal of the opinion in that case demonstrates that the Court merely held, that as the state had the power to impose a license tax upon domestic corporations, it might impose a similar tax upon a foreign corporation desiring to carry on business therein.

Several other cases are relied upon by defendant in error. Two of these will be discussed here, and the others considered under the next section of this brief. These two cases involve the right to remove cases to the Federal Courts and should therefore

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be considered in connection with the other cases involving removal questions.

The first of these, Doyle v. Continental Ins. Co., 4 Otto 535; 24 L. Ed. 148, was an early case refusing an injunction to prevent state officers from ousting from the state a foreign corporation by reason of its attempt to remove a cause of action to the Federal courts, in violation of a stipulation to the contrary theretofore filed by the corporation in question. Three of the justices dissented.

In Home Ins. Co. v. Morse, 20 Wall. 445; 22 L. Ed. 365, the Court had already held that a statute requiring the filing of an agreement not to remove by a foreign corporation was unconstitutional and void, and might therefore be disregarded by the corporation, even after such an agreement had been filed. The Court there said:

“Is the statute of the State of Wisconsin, which enacts that a corporation organized in another state shall not transact business within its limits, unless it stipulates in advance that it will not remove into the Federal Courts any suit that may be commenced against it by a citizen of Wisconsin, a valid statute in respect to such requisition, under the Constitution of the United States? (P. 368) * * * *None of the cases so much as intimate that conditions may be imposed which are repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and*

authority of each state from encroachment by others. * * * (P. 370).

"On this branch of the case the conclusion is this:

"1. The Constitution of the United States secures to citizens of another state than that in which suit is brought an absolute right to remove their cases into the Federal Court, upon compliance with the terms of the Act of 1789.

"2. The Statute of Wisconsin is an obstruction to this right; is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

"3. The agreement of the insurance company derives no support from an unconstitutional statute and is void, as it would be had no such statute been passed (P. 370.)"

In the Doyle case the Court expressly recognized the Home Insurance case:

"The case of The Home Insurance Co. v. Morse, *supra*, is the basis of the bill of complaint in the present suit. We have carefully reviewed our decision in that case, and are satisfied with it. * * * This was upon the principle that every man is entitled to resort to all the courts of the country, to invoke the protection which all the laws and all the courts may afford him, and that

he cannot barter away his life, his freedom or his constitutional rights. * * * (P. 150.)

"The cases of *Bk. v. Earle*, *Ducat v. Chicago*, *Paul v. Va.*, and *Ins. Co. v. French*, establish the principle that a state may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions, and restrictions it may think proper, *that are not repugnant to the Constitution or laws of the United States*. * * *" (P. 151.)

The Court then proceeds to place its decision on the ground that the motive of the state in ousting a corporation cannot be examined:

"The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion, which cannot be applied to the affairs of life. If the Act done by the state is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law." (P. 152.)

This point next came before the Court in *Baron v. Burnside*, 121 U. S. 186; 30 L. Ed. 915, wherein it was again held, following the Home Insurance case, that a statute requiring such waiver of the

right to remove was unconstitutional. The Court then said of the Doyle case, at page 919:

"The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a Court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co. v. Morse*, *supra*, must be regarded as not in judgment."

Southern Pacific Co. v. Denton, 146 U. S. 202; 36 L. Ed. 942, at 945, follows with the statement:

"But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions.—*Home Ins. Co. of N. Y. v. Morse*, 87 U. S., 20 Wall 445; *Barron v. Burnside*, 121 U. S. 186."

This was followed by the holding in the case of *Gerling v. B. & O. R. Co.*, 151 U. S. 673; 38 L. Ed. 311, 315:

"The Baltimore & Ohio Railroad Company not being a corporation of West Virginia, but only a corporation of Maryland,

licensed by West Virginia to act as such within its territory, and liable to be sued in its courts, had the right under the Constitution and laws of the United States, when so sued by a citizen of this state, to remove the suit into the Circuit Court of the United States; and could not have been deprived of that right by any provision in the statutes of the state. (Citing Home Insurance, Barron, and Denton cases)."

Again, in *Cable v. U. S. Life Ins. Co.*, 191 U. S. 288; 48 L. Ed. 188, at 193, it was said:

"No stipulation or agreement, founded on a state statute or otherwise, which the company may have entered into, could prevent the removal of the case in the exercise of its constitutional right. This has been so held in *Home Ins. Co. v. Morse*, 20 Wall. 445; 22 L. Ed. 365; and that case has been repeatedly approved."

So the law remained until the second case, cited by Defendant in Error—*Mutual Life Ins. Co. v. Prewitt*, 200 U. S. 446; 50 L. Ed. 545; 202 U. S. 246; 50 L. Ed. 1013, arose. That case involved the same point as the Doyle case, and the Court, after considering and reaffirming all of the foregoing cases, held, with two dissents, that the state could oust a foreign corporation at will and that the reason for such action was immaterial. The Court, however, recognized the principle for which we here contend:

"A state has the right to prohibit a for-

eign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the Federal Constitution. Among the later authorities on that proposition are: Hooper v. California, 155 U. S. 648, 39 L. Ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Allgeyer v. Louisiana, 165 U. S. 578-583, 41 L. Ed. 832, 833, 17 Sup. Ct. Rep. 427; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. Ed. 552, 19 Sup. Ct. Rep. 281; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. Ed. 657, 20 Sup. Ct. Rep. 518; New York L. Ins. Co. v. Cravens, 178 U. S. 389-395, 44 L. Ed. 1116-1122, 20 Sup. Ct. Rep. 962; John Hancock Mut. L. Ins. Co. v. Warren, 181 U. S. 73, 45 L. Ed. 755, 21 Sup. Ct. Rep. 535." (P. 1015.)

The Court then continues as the ground of its decision:

"As a state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial." (P. 1018.)

The air was fully cleared when the decision was handed down in Herndon v. C. R. I. & P. R. Co., 218 U. S. 135; 54 L. Ed. 970, wherein officers of the state attempted to revoke the license of the defend-

ant company for having brought suit in a Federal Court in violation of the Missouri statute. Of this statute the Court held and said:

"As to the validity of the act of March 13, 1907, forfeiting the right of the company to do business in the State of Missouri, and subjecting it to penalties in case it should bring a suit in the Federal Courts, or remove one from the State Courts to the Federal Courts, but little need be said. This is so because of the cases decided at this term, involving contentions kindred to the one made in this case. See Western U. Teleg. Co. v. Kansas, 216 U. S. 1 *ante* 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, *ante*, 378, 30 Sup. Ct. Rep. 232; Ludwig v. Western U. Teleg. Co., 216 U. S. 146, *ante*, 423, 30 Sup. Ct. Rep. 280; Southern R. Co. v. Greene, 216 U. S. 400, *ante* 536, 30 Sup. Ct. Rep. 287.

"Applying the principles announced in those cases, it is evident that the act in controversy cannot stand, in view of the provisions of the Constitution of the United States." (P. 978.)

The last remark of the Supreme Court, in a unanimous opinion on this question, appears in the recent case of *Harrison v. St. L. & S. F. R. Co.*, 232 U. S. 318; 58 L. Ed. 621, at 626, where, referring to the Herndon case, it is said:

"The grounds of the decision in the last

case show the extremely narrow scope of the rulings in the Doyle and Prewitt cases, and render their inapplicability to this case certain. Indeed, the ruling in the Herndon case and in those subsequent to the Doyle and Prewitt cases, most of which were reviewed in the Herndon case, demonstrates that *no authority is afforded by those two cases for the conception that it is within the power of the state in any form, directly or indirectly, to destroy or deprive of a right conferred by the Constitution and laws of the United States.*"

No further discussion of the Doyle and Prewitt cases would seem necessary, but an examination of the holdings therein discloses a clear distinction between those cases on the one hand, and the other foregoing authorities and the case at bar on the other hand, while in addition the Doyle and Prewitt cases expressly recognize that an unconstitutional condition cannot be imposed upon the right of a foreign corporation to carry on business in any state.

In each of these two cases the action was to restrain state officers from ousting a foreign corporation from the state, and the Supreme Court refused to interfere, on the ground that it would not examine the motives causing such action. In all of the other cases, however, and in the case at bar, that point is not involved, but the whole point is whether a foreign corporation is bound in its actions, and subject to, an unconstitutional statute. Certainly it is clear from these cases, and as we have

seen the Court has repeatedly declared, that a foreign corporation is not bound by and may entirely ignore a statute which attempts to impose upon it an unconstitutional condition. This has been true ever since the holding in the Home Insurance case, and although that decision involved the constitutional right to remove, there can be no distinction between that right and the constitutional right to due process of law. So here, although the state might attempt on the authority of the Doyle and Prewitt cases, if still in good standing—which we do not admit—to oust the appellant from the State of Missouri for refusing to be bound by the broader construction of Section 7042, yet that does not prevent appellant from ignoring and refusing to be bound in *this* case by that statute, insofar as it may be unconstitutional.

III.

PLAINTIFF IN ERROR IS NOT ESTOPPED TO DENY THE CONSTITUTIONALITY OF SECTION 7042 BY REASON OF ITS HAVING QUALIFIED TO CARRY ON BUSINESS IN MISSOURI.

Defendant in Error argues that as Plaintiff in Error has qualified to carry on business in Missouri, having executed its power of attorney, and has therefore obtained the benefits of doing business therein, it must assume all the concomitant burdens, and cannot be heard to object on the ground of unconstitutionality however onerous such burdens may

be. The chief fallacy in this argument, however, rests in the fact that Plaintiff in Error is not deriving or claiming any benefits from its business in, or the laws of, Missouri. Had Plaintiff in Error issued the insurance policy in suit in Missouri, or had the property destroyed been there located, defendant in error might stand in a better light. But so far as the present case is concerned, the Plaintiff in Error's privilege of carrying on business in this state is immaterial. Defendant in Error seeks to charge it with all the burdens in a case where the facts show that the laws of Missouri were incapable of bestowing any benefits. The Plaintiff in Error is not asserting any right to carry on business in this state and therefore it is not estopped to assail the constitutionality of the act in question.

Assuming, however, the absence of this fallacy, the authorities cited by Defendant in Error may be examined. Reliance is placed on a statement made by Justice White in *Pullman Co. v. Kansas*, 216 U. S. 56; 54 L. Ed. 378. The holding in that case, however, was that a statute imposing a charter fee upon the entire capital stock of a foreign corporation, as a condition of doing local business, was unconstitutional. The opinion of the Court was written by Mr. Justice Harlan and no mention of the subject touched by Mr. Justice White appears therein. Whatever, therefore, appears in the opinion of Mr. Justice White, is not necessarily the opinion of the Court, and the statement cited, in view of the holding of the Court, is purely dictum. When we consider that the paragraph from which respondent's quotation is taken begins: "Subject to constitutional lim-

itations, the states have the power to regulate the doing of a local business within their borders," and further take into consideration other statements, hereinafter discussed, made by the same eminent Justice, this statement loses all of its force, and it becomes apparent that he did not have in mind the situation now presented to this Court.

If Defendant in Error's contention be correct, decisions of the United States Supreme Court beyond number must be construed as overruled by a mere dictum.

Thus in *Home Insurance Co. v. Morse*, 20 Wall. 445; 22 L. Ed. 365, the Court held that a foreign corporation which had filed a stipulation not to remove litigation to the Federal Courts might ignore such stipulation entirely, as the statute under which it was filed was unconstitutional and void. The Court there said that one cannot be bound "in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." (P. 368).

So in *Barron v. Burnside*, 121 U. S. 186; 30 L. Ed. 915, it is said:

"As the Iowa Statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring a permit must be held to be void (p. 920)."

The Court in *Southern Pacific Co. v. Denton*

146 U. S. 202; 36 L. Ed. 942, at 945, stated this principle even more clearly:

"But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions. Citing authorities."

And in *Cable v. U. S. Life Insurance Co.*, 191 U. S. 288; 48 L. Ed. 188, at 193, it is said:

"No stipulation or agreement, founded on a state statute or otherwise, which the company may have entered into, could prevent the removal of the case in the exercise of its constitutional right. This has been so held in *Home Insurance Co. v. Morse*, 20 Wall. 445; 22 L. Ed. 365; and that case has been repeatedly approved."

Then follow the two cases of *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1; 54 L. Ed. 355, and *Pullman Co. v. Kansas*, 216 U. S. 56; 54 L. Ed. 378, the latter of which cases contains the statement by Mr. Justice White relied upon by defendant in error.

In each of these cases a foreign corporation was attacking certain provisions of the state statutes on

the ground of unconstitutionality ; and in the former case Justice Harlan says, at page 369 :

“Can such a regulation be deemed constitutional any more than one requiring the company, as a condition of its doing intra-state business, that it should surrender its right, for instance, to invoke the protection of the constitution when it is proposed to deprive it of its property without due process of law, or to deny it the equal protection of the laws ?”

In this same case Justice White filed a concurring opinion, and as this case was decided in the same month and year as the Pullman case, what he here said throws considerable light upon what is meant by his statement in the Pullman case. He says :

“This cause is concerned, not with the power of the state to prevent a corporation coming in for the purpose of doing local business, and to attach conditions to the privilege of so coming in, but involves the right of the state to confiscate the property of the corporation already within the state, and which has been there for years devoted to the doing of local business, as the result of the implied invitation or tacit consent of the state, arising from its failure to forbid or to regulate the coming in. In other words, this case involves determining, not how far a state may arbitrarily exclude, but

to what extent, after allowing a corporation to come in and acquire property, a state may take its property within the state without compensation, upon the theory that the corporation is not in the state, and has no property right therein which is not subject to confiscation. The difference between the premise upon which the proposition contended for rests and the situation here presented seems to me self-evident. I say this because my mind fails to perceive how the doctrine of election or voluntary assumption of an unconstitutional burden can have any possible application to a case like this.

* * * The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in the state. It has been invested therein for the very purpose of doing local as well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place." (Ps. 375-376.)

From another angle the foregoing statement by Mr. Justice White is also pertinent. For it is a mat-

ter of common knowledge that when Section 7042 was passed by the Legislature of Missouri, there were numerous insurance companies then owning large amounts of property and carrying on business in Missouri, and by compelling these companies to accept the provisions of this statute, or surrender this property and business as an alternative, the case comes directly within the foregoing language.

In this connection plaintiff in error is within the state and if the statute in question is to be given the broader construction by this Court, plaintiff in error will certainly be deprived of its property without due process of law under the rulings in the Simon and Old Wayne cases.

The last expression by Mr. Justice White in this connection appears in the case of *Harrison v. St. L. & S. F. R. Co.*, 232 U. S. 318; 58 L. Ed. 621, and it would seem from this subsequent expression that he did not have in mind the contention of defendant in error in making the earlier statement contained in the Pullman case. In the Harrison case, by way of limitation of the Doyle and Prewitt cases, he says, at page 626:

“No authority is afforded by those two cases for the conception that it is within the power of the state in any form, directly or indirectly, to destroy or deprive of a right conferred by the Constitution and laws of the United States.”

Baltic Mining Co. v. Mass., 231 U. S. 68; 58 L. Ed. 127, also subsequent to the Pullman case, contains the statement:

"A state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law" (p. 133).

And to the same effect are the very recent cases of *Herndon v. C. R. I. & P. R. Co.*, 218 U. S. 135; 54 L. Ed. 970, and *South Carolina v. McMaster*, 237 U. S. 63, U. S. Adv. Ops. 1914, 504.

There are other cases, not heretofore considered, dealing very pertinently with this question of estoppel as to constitutionality.

Thus, *Cargill Co. v. Minn.*, 180 U. S. 452; 45 L. Ed. 619, was an action to enjoin the Cargill Company from operating an elevator and warehouse until a license had been taken out in accordance with the Minnesota Statute. The Court there said, at page 626:

* "The defendant, however, insists that some of the provisions of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and (in the same words of the statute) 'thereby to have agreed to comply with the same.' Section 1. The answer to this suggestion is that *the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state railroad and warehouse*

commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and the valid rules and regulations prescribed by the commission. If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

And in the recent case of *M. P. R. Co. v. Tucker*, 230 U. S. 340; 57 L. Ed. 1507, a foreign corporation was allowed without question to attack a statute providing for a \$500.00 damage fee for overcharges on local shipments of oil.

In fact there are numerous cases in which this so-called right to attack has never been questioned. Among these are the following:

- N. W. Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 51 L. Ed. 168.
G. C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. Ed. 666.
Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. Ed. 552.
Crutcher v. Ky., 141 U. S. 47, 35 L. Ed. 649.

Thus it is clear that if the contention of defendant in error with respect to Mr. Justice White's meaning be correct, all of the foregoing cases must be held for naught, and all of the cases in the preceding section of this brief, several of which were decided subsequent to the making of this statement by Mr. Justice White, and holding that unconstitutional conditions cannot be imposed upon a foreign corporation, become meaningless.

And by its statement in the Simon case, *supra*, to the effect that it was immaterial whether the Southern Railway was doing business in Louisiana, the Supreme Court has conclusively shown that when constitutional questions are involved the right of a foreign corporation to attack an unconstitutional provision does not depend on whether or not it is doing business in the state.

Respondent also relies upon *Grand Rapids R. Co. v. Osborn*, 193 U. S. 17; 48 L. Ed. 598. But that case did not involve the rights of a foreign corporation in any way, and there was no question of a suit on a foreign cause of action.

So *State v. Messerly*, 198 Mo. 351; 95 S. W. 913, merely held that a justice of the peace accepting a salary under an unconstitutional law without objection, and without demand for his proper fees, waived the right to sue for past fees, when the law providing for his salary was subsequently declared unconstitutional.

The authorities undoubtedly hold that a state cannot make an unconstitutional condition the price of admission to carry on business in the state, and that, as a result of this, even though the unconstitu-

tional condition be expressly complied with, the foreign corporation may thereafter ignore its compliance as being entirely void by reason of the unconstitutionality of the condition. No case has been cited holding that a foreign corporation, after complying with such unconstitutional condition, can be estopped to deny its validity, but numerous cases have been cited in which this right of a foreign corporation to attack such condition was expressly recognized and acted upon.

A corporation is a person within the meaning of the Fourteenth Amendment.

G. C. & S. F. R. Co. v. Ellis, 165 U. S. 150;
41 L. Ed. 666.

Hence the plaintiff in error is entitled to the protection of that amendment, and if the Courts refuse to allow it to uphold its rights in that regard in this case, it will be deprived of its property without due process of law as surely and as certainly as the Southern Railway and the Old Wayne Mutual Life Insurance Association were attempted to be deprived of their property without due process of law in those cases.

IV.

THE QUESTION OF JURISDICTION HAS BEEN KEPT A LIVE ISSUE AT EVERY STAGE OF THESE PROCEEDINGS. APPELLANT HAS AT NO TIME WAIVED ITS RIGHT TO INSIST THAT THE MISSOURI COURTS ARE WITHOUT JURISDICTION OF THIS CONTROVERSY, AND AT EVERY STAGE HAS ASERTED AND CLAIMED ITS RIGHT TO PROTECTION UNDER THE FEDERAL CONSTITUTION.

A sufficient answer to the contention of Defendant in Error that the Plaintiff in Error waived its right to assert and claim want of jurisdiction, and that the Supreme Court of Missouri decided against Plaintiff in Error, upon a non-federal ground is found in the Court's opinion (Transcript pp. 270-329). At page 276 of the transcript, in the course of the Court's opinion, it is said:

"Returning to that statute; every phase of this statute save its constitutionality was carefully considered and determined by this Court in the case of State ex rel v. Grimm, 239 Mo. 135, l. c. 159. Since, however, its meaning has again been questioned and its constitutionality assailed, I will add some additional views as to its meaning and then carefully consider its constitutionality."

The Supreme Court of Missouri did not decide against plaintiff in error upon any state ground; it did not hold or even consider whether or not there

had been any waiver by Plaintiff in Error of any rights, but on the contrary deemed the Federal questions, raised by Plaintiff in Error, to be before it, discussed such questions at great length and decided them all adversely to the Federal rights claimed. And in the dissenting opinion (Transcript pp. 319-329), which was the opinion filed in Division, it is expressly held that Plaintiff in Error had waived no rights and the reasons for such holding are fully set forth.

The first move made by appellant, after service of summons, was the filing of its motion to quash, which appears in the Transcript at pages 126-128. This motion was based upon a special appearance and while it is somewhat lengthy it goes only to the question of jurisdiction, the reasons why jurisdiction of this case should not be assumed and challenges the maintenance of this action in the Courts of Missouri as a violation of the rights guaranteed to appellant by the Constitution of Missouri, as well as by the Federal Constitution. At the time the motion to quash was filed and ruled upon, the record did not show want of jurisdiction in the Missouri courts. The petition alleged that the plaintiff was a corporation organized under the laws of Arizona, and that the defendant was a corporation organized under the laws of Pennsylvania. The petition further alleged the description of the insured property in the words of the policy, from which it appears that the insured property was located in the State of Colorado. The place of making of the contract of insurance is not shown by any allegation. For aught that appears in the petition, the policy may have

been issued by the defendant's agent in Missouri, and the contract of insurance may have been a Missouri contract, arising out of business done and transactions between the parties, wholly within that state. Defendant's motion to quash was overruled by the trial court and thereafter the record shows that the case was continued from term to term on the Court's own motion, and not at the request of the Insurance Company.

Prior to the filing of its answer Plaintiff in Error did everything within its power to challenge the jurisdiction of the Court. The fact that the contract was a Colorado contract first appears from the allegations of the answer wherein the challenge to the Court's jurisdiction, as contained in the motion to quash, is preserved, and it is alleged that the policy of insurance was made and executed in the State of Colorado upon property there located, and is therefore a Colorado, and not a Missouri contract. The reply admits that the policy or contract of insurance was made and executed in the State of Colorado, though attempting to deny that the contract is a Colorado contract, and we then first have apparent on the record all facts necessary to show that the trial Court was without jurisdiction of this controversy.

It is clear that jurisdiction was challenged from start to finish and that there was no waiver of the jurisdictional question prior to the filing of appellant's answer. Inasmuch as all elements necessary to show want of jurisdiction did not appear upon the face of the petition or elsewhere in the record, prior to the filing of its answer, Plaintiff in Error, by the

very terms of Sections 1800 and 1804, R. S. of Mo., 1909, had the right to raise the jurisdictional question, by its answer and having so raised the question, it is well preserved.

Section 1800 R. S. of Mo., 1909, referred to, reads as follows:

"The defendant may demur to the petition, when it shall appear upon the face thereof either: First, that the court has no jurisdiction of the person of the defendant or the subject of the action; or, second, that the plaintiff has not legal capacity to sue; or, third, that there is another action pending between the same parties, for the same cause, in this state; or, fourth, that there is a defect of parties plaintiff or defendant; or, fifth, that several causes of action have been improperly united; or, sixth, that the petition does not state facts sufficient to constitute a cause of action; or, seventh, that a party plaintiff or defendant is not a necessary party to a complete determination of the action."

Section 1804 R. S. Mo., 1909, also referred to, *supra*, contains the following provisions:

"When any of the matters enumerated in Section 1800 do not appear upon the face of the petition, the objection may be taken by answer. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same

excepting only the objection to the jurisdiction of the Court over the subject matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action."

The common law rule that a plea in bar waives all dilatory pleas or pleas not going to the merits is familiar law. But under the code, the only pleading on the part of the defendant is either a demurrer or an answer, and a defendant may set forth by answer as many defenses as he may have. If the jurisdictional defect does not appear upon the face of the petition the defendant may question the jurisdiction by answer and does not waive the right to insist upon want of jurisdiction by filing an answer which joins a plea to the merits with an objection to the jurisdiction.

The leading case in this jurisdiction laying down this principle, and differentiating the practice under the code from the common law practice, is *Little v. Harrington*, 71 Mo. 390. In that case the Court considered the question of the proper method of raising an objection for non-joinder of parties plaintiff and reached the conclusion that the common law rule, that a plea in bar waives dilatory pleas, had been changed by the Missouri code, by the following course of reasoning:

"The statute expressly says that 'the only pleading on the part of the defendant, is either a demurrer or an answer.' 2 Wag. Stat., p. 1014, Section 4. And with the same degree of explicitness, it is provided that

the defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both.' Ib. 1016, Section 13. It is evident from these statutory provisions, that only one answer is contemplated, and this to contain whatever defense or defenses the defendant may have, thus dispensing with the common law rule that a plea in bar waives all dilatory pleas, or pleas not going to the merits."

The Court then approves of the following statement found in Bliss on Code Pleading:

"Matter in abatement is as much a defense to the pending action as matter in bar, and to say that the defendant may reserve the latter until a trial shall have been had upon the issues, in regard to the former, would interpolate what is not in the statute; would be inconsistent with its plain and simple requirements."

The Court soon had occasion, in Byler v. Jones, 79 Mo. 261, to approve the rule of practice laid down in the last cited case, in the following language:

"I may remark in this connection that under the recent decisions of this Court the defendant could have included in his answer a defense to the merits of the case, without foregoing the benefits of his plea to the jurisdiction."

Since *Little v. Harrington, supra*, was decided the doctrine of that case to the effect that a defendant may join in his answer a plea to the jurisdiction, along with a plea to the merits, has been reiterated and reaffirmed by a long line of decisions in the Missouri Supreme Court, as well as in the Circuit Courts of Appeal of that state. That doctrine is now so firmly established as a rule of practice in that state that it cannot now be successfully controverted.

In *Johnson v. Detrick*, 150 Mo. 253; 53 S. W. 891, the Court ruled, that even though want of jurisdiction was apparent upon the fact of the petition, a defendant was not required to raise the question of want of jurisdiction by demurrer, but had the option of raising such question by answer. In that case the Court said:

"But plaintiff insists that all these matters appeared on the face of the petition, and that under Section 2043, Rev. St. 1889, the duty of the defendant was to demur to the petition; that under Section 2047, Rev. St. 1889, an objection to the jurisdiction can only be taken by answer when the want of jurisdiction does not appear on the face of the petition, and therefore these defendants waive the objection by failing to demur. It will be observed that, while Section 2043 permits a demurrer to a petition where the want of jurisdiction appears upon the face of the petition, it does not require it to be exclusively raised in that manner. A plea

to the jurisdiction, even when coupled with a plea to the merits, is permissible under our code; and the latter plea does not, as at common law, waive the former."

Under the Missouri practice there is no room for even a contention that Plaintiff in Error waived any rights at any stage of the proceedings in the Missouri Courts.

Hoffman v. Loudon, 96 Mo. App. 184; 70 S. W. 162.

Newcomb v. N. Y. C. & H. R. R. Co., 182 Mo. 687; 81 S. W. 1069, 1073.

Thomasson v. Mercantile Town Mutual Insurance Company, 217 Mo. 485; 116 S. W. 1092.

Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co., 137 Mo. App. 308; 118 S. W. 500.

Curfman v. Fidelity & Deposit Co., 167 Mo. App. 507; 152 S. W. 126.

Stegall v. American Pigment & Chemical Co., 150 Mo. App. 251; 130 S. W. 144.

Jordan v. Chicago & Alton Railway Co., 105 Mo. App. 446; 79 S. W. 1155.

Houston v. Publishing Co., 249 Mo. 332; 155 S. W. 1068.

Barnett v. Colonial Hotel Building Co., 137 Mo. App. 636; 119 S. W. 471.

Little Rock Trust Company v. Southern Missouri & Arkansas Railroad Co., 195 Mo. 669; 93 S. W. 944.

Christian v. Williams, 111 Mo. 429; 20 S.W. 96.

The following rules are deducible from the foregoing cases. The question of jurisdiction may arise on the face of the return on the summons, or on the face of the petition, or by reason of facts not appearing either in the return or in the petition. If the jurisdictional question arises on the face of the return it is only a question whether the defendant has been properly served and that question may be then properly raised by a motion to quash. If the question arises on the face of the petition it may be raised either by demurrer or by answer at the option of the defendant, and in that case the question is only waived in the event that it is not challenged by one or the other methods. If the question arises from some fact that appears neither in the return nor in the petition, then, of course, it can only be presented by answer.

The defendant's challenge to jurisdiction in this case was not only timely but continuous. Jurisdiction of the person can only be acquired by service of process upon him in the manner prescribed by law or by his expressed or implied consent. It cannot be contended that the defendant in this case ever expressly consented to the assumption of jurisdiction over its person by the Trial Court. Implied consent, frequently denominated waiver of jurisdiction, arises out of conduct on the part of a defendant which indicates a willingness for the Court to assume jurisdiction and try the case. Such willingness is evidenced by the filing of an answer or by the

entry of a general appearance without questioning the jurisdiction of the Court.

By no possible stretch of the imagination can this Plaintiff in Error be held to have indicated a willingness to submit the determination of this cause to the Trial Court. The Plaintiff in Error has waived nothing as to jurisdiction; on the contrary it has persistently protested want of jurisdiction. It embodied its plea to the jurisdiction in its answer, the place where the statutes of the state say that such a plea may be lodged. The fact that the contract of insurance was made and executed in Colorado, upon property there located, first appeared in the record from the admissions in the reply. It then appeared for the first time that the contract of insurance was not a Missouri contract, nor the result of business done in Missouri. As the fact thus admitted was one of the necessary elements to show want of jurisdiction in the Trial Court, and as such fact did not appear upon the face of the petition, demurrer was not the method by which Plaintiff in Error might raise its jurisdictional objection.

Of course there can be no presumption from the allegations of the petition that the insured property was located in Colorado; that the contract was made in that state, and was a Colorado contract.

Pennypacker v. Capital Ins. Co., 80 Iowa 56; 45 N. W. 408, 8 L. R. A. 236.

Our objection for want of jurisdiction was timely and continuous and was lodged where the statutes say it may be lodged.

When the defendant appears specially and ob-

jects to the jurisdiction of the Court, and such objection is overruled, he does not waive his right to assert no jurisdiction by thereafter appearing generally, filing an answer and contesting the case on the merits. The prevailing rule is that illegality in a proceeding by which jurisdiction over the person of the defendant is sought to be obtained, is in no case waived by the appearance of the defendant for the purpose of calling the attention of the Court to such irregularity. Nor is the objection waived when, being urged, it is overruled and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contest. It is only when he pleads to the merits in the first instance without insisting upon the illegality, that the objection is deemed to be waived. To force the defendant to waive his objection by saying that if he does not do so he can make no defense on the merits, is a palpable denial of a legal right.

V.

PLAINTIFF IN ERROR IS NOT CONCLUDED
BY STATE EX REL. V. GRIMM, 239 MO. 135,
143 S. W. 483.

A conclusive answer to the contention of Defendant in Error that Plaintiff in Error is concluded by State ex rel. v. Grimm, 239 Mo. 135, 143 S. W. 483, is found in the majority opinion of the Court in this case (Transcript, p. 276), where it is said:

"Returning to that statute: Every phase of this statute save its constitutionality was carefully considered and determined by this court in the case of State ex rel. v. Grimm, 239 Mo. 135, l. c. 159. Since, however, its meaning has again been questioned and its constitutionality assailed, I will add some additional views as to its meaning and then carefully consider its constitutionality."

The questions raised in the Grimm case were purely questions of construction of the statute, and it is apparent from the foregoing quotation from the opinion in this case that the Supreme Court of Missouri did not consider that it had decided any constitutional questions in the previous case. In the case at bar the Court did not decide against plaintiff in error upon an independent state ground, but deemed the Federal questions to be before it, discussed such questions at great length in its opinion and decided them all adversely to the Federal rights claimed by Plaintiff in Error. This is sufficient to give Plaintiff in Error standing in this Court.

Rogers v. Hennepin, 239 U. S. 621.

A further conclusive answer to the contentions made, is that the record in the Grimm case is not before this Court, and this Court will not take judicial notice of the matters determined there.

If it be assumed that this Court is fully advised of the matters determined in the Grimm case, and this Plaintiff in Error be bound by anything there

said and the appeal in this case be considered as a second appeal, the holding and opinion of the Supreme Court of Missouri in this case has effectively recalled the holding in the Grimm case and has altered and corrected that holding as permitted by the local law of the State of Missouri.

Moss v. Ramey, 239 U. S. 538.

The Supreme Court of Missouri has long ago held that it may, upon a second appeal, alter, amend, correct, recall or revise its interlocutory decision or decision upon a former appeal in the same case.

Mangold v. Bacon, 237 Mo. 496; 141 S. W. 650.

Rutledge v. Mo. Pac. Railway Co., 123 Mo. 121; 24 S. W. 1053, 27 S. W. 327.

Chamber's Administrator v. Smith's Administrator, 30 Mo. 156.

Bird v. Sellers, 122 Mo. 23, 26 S. W. 668.

Bealey v. Smith, 158 Mo. 515, 59 S. W. 984.

VI.

THE SUPREME COURT OF MISSOURI REFUSED AND FAILED TO GIVE FULL FAITH AND CREDIT TO THE PUBLIC ACTS, LAWS, RECORDS AND JUDICIAL PROCEEDINGS OF THE STATE OF COLORADO, THEREBY VIOLATING ARTICLE 4, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES, AND THUS RAISING A FEDERAL QUESTION.

A second, separate and independent ground of federal jurisdiction, sufficient in itself to confer jurisdiction on this Court, was raised and claimed in the answer filed by plaintiff in error, was urged at every successive step in the progress of this case, was made a distinct ground for writ of error in the petition for writ of error, and the failure of the Missouri courts to recognize the principle urged, is assigned as error in this Court.

Paragraph V of Plaintiff in Error's answer, appearing at pages 16, 17 and 18 of the transcript of record, sets up the fact that by the terms of the policy of insurance, and as a condition thereof, the policy should be void if the insured was other than an unconditional and sole owner, in fee simple, of the ground upon which the insured building stood; that defendant in error was not at the time of the issuance of the policy nor at the time of the alleged fire the fee simple owner of said ground, for the reason that it had not qualified itself to carry on business in the State of Colorado, in accordance with the statutes of such state; that such statutes provide

that until the fees fixed therein to be paid the Secretary of State shall have been paid, by any foreign corporation seeking admission to the state:

"No such corporation, joint stock company or association shall have or exercise any corporate powers or hold or acquire any real or personal property, franchises, rights or privileges * * *".

And further, until a certificate of authority to carry on business is obtained, the same restrictions shall exist; that a similar statute had been enacted and was in force in the year 1895, which statute had received a judicial construction by the Supreme Court of the State of Colorado in the case of *Jones v. Aspen Hardware Co.*, 21 Colo. 263, wherein it was held that a domestic corporation having failed to pay the fee required by such statute could not acquire, take or hold any title whatever to property in that state; that the construction of such former statute is carried over to a subsequent enactment covering the same or similar subjects, and that other authorities cited, pleaded and specifically mentioned show that in accordance with the decided cases of the Supreme Court of the State of Colorado, the defendant in error obtained no title to the premises in question and the policy of insurance in suit, therefore, was void.

The sections of the Colorado statutes introduced and received in evidence appear at page 17 of the transcript of record and again at pages 136 and 137 thereof. They are as follows:

*Section 904, Revised Statutes of Colorado for
1908.*

"Sec. 904. Fees of foreign corporations—shall not do business until fees are paid.—Sec. 60.

"Every corporation, joint stock company or association, incorporated by or under any general or special law of any foreign state or kingdom, or any state or territory of the United States, beyond the limits of this state, having a capital stock divided into shares, shall pay to the secretary of state, for the use of the state, a fee of thirty dollars in case the capital stock which said corporation, joint stock company or association is authorized to have, does not exceed fifty thousand dollars; but in case the capital stock thereof is in excess of fifty thousand dollars, the secretary of state shall collect the further sum of thirty cents on each and every thousand dollars of such excess, and a like fee of thirty cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of the certificate of incorporation, articles of association or charter of said corporation, joint stock company or association in the office of the Secretary of State, and no such corporation, joint stock company or association shall have or exercise any corporate powers or hold or acquire any real or personal property, franchise, rights or privileges, or be

permitted to do any business or prosecute or defend in any suit in this state until the said fee shall have been paid."

*Section 910, Revised Statutes of Colorado for
1908:*

"Sec. 910. Certificate of Authority—
Fee—Shall not transact business without—
Sec. 66.

"No corporation, joint stock company or association, incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom or of any state or territory of the United States, beyond the limits of this state, shall exercise any corporate powers or acquire or hold any real or personal property, or any franchise, rights or privileges, or do any business or prosecute or defend in any suit, in this state until it shall have received from the secretary of this state a certificate setting forth that full payment has been made by such corporation, joint stock company or association, of all fees and taxes prescribed by law to be paid to the secretary of state, and every such corporation, joint stock company or association shall pay to the secretary of state for each certificate, a fee of five dollars. Nothing in this section shall apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes."

The case of *Jones v. Aspen Hardware Co.*, *supra*, introduced and received in evidence, appears at pages 138 to 139 of the transcript of record and again at pages 246 to 251 thereof.

The Court in that case quotes from the statute there under consideration and the pertinent portion of the opinion claimed by this Plaintiff in Error to be decisive is as follows:

"In this case the Aspen Hardware Company claims title to the property in dispute in its corporate capacity, and not as a co-partnership. It is admitted that the fee for filing the certificate of incorporation with the secretary of state was not paid prior to the levy of the writ of attachment, and that the certificate was not filed in the office of the secretary of state until about the time of bringing of the present action, the evidence leaving the exact time uncertain.

"It is to be remembered that in this case the corporation is the party plaintiff, and it may be stated as a general rule that when a company relies on its corporate capacity it assumes the burden of establishing such capacity.

"The language of the act is plain and unambiguous. It reads, 'No such corporation * * * shall have or exercise any corporate powers * * *' The taking of title to property was certainly the exercise of a corporate power, and as such pro-

hibited by the express terms of the statute
• • •

"One object of this statute is to restrict the organization of 'wild-cat' corporations, it being supposed that the increased fee required by the act would, in a measure at least, prevent the over-capitalization of companies. The legislature being of the opinion that this purpose would be advanced by requiring the fee to be paid as a condition precedent to the exercise of any corporate power, it is the duty of the courts to give effect to this intent as the same is manifest from the plain language of the act. The taking of title to the property in controversy being the exercise of a corporate power, and, as such, forbidden until the fee for filing has been paid, it follows that the title of the Aspen Hardware Company as a corporation cannot be upheld. Having failed to comply with the statute, the Aspen Hardware Company, at the time of the transfer, was neither a *de jure* nor a *de facto* corporation, but simply a voluntary association of individuals in the nature of a copartnership."

It is true that the corporation involved in that case was a domestic and not a foreign corporation, but Section 917 of the Revised Statutes of 1908 of Colorado admitted in evidence and appearing at page 133 of the transcript of record provides that foreign corporations:

"shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon such corporations of like character organized under the general laws of this state, and shall have no other or greater powers. And no foreign or domestic corporation, established or maintained in any way for pecuniary profit to its stock holders or members shall purchase or hold real estate in this state except as provided for in this Act * * *."

The Supreme Court of Colorado, in the case of Iron Silver Mining Co. v. Cowie, 31 Colo. 450, pleaded in the answer, introduced in evidence and appearing at page 257 of the transcript of record considered the above provision of the Colorado statutes holding that under the restrictive clause, a foreign corporation could not extend its term of existence beyond the period of twenty years, provided by the statutes of Colorado for domestic corporations without compliance with the Colorado statute relating to the extension of the term of existence of corporations, although the original term of existence of the foreign corporation in question in its state of origin had not yet expired.

The consideration of these two cases leads to the inevitable conclusion that under the statutes and the decisions of the Supreme Court of Colorado considering those statutes, the Defendant in Error did not have title to the premises in question at the time of the issuance of the policy in suit nor at the time of the occurrence of the fire. The real estate in

question being situated in Colorado, it is the common law as well as the law of Missouri that the title thereto depends upon the law of the State of Colorado.

**Union National Bank v. State National
Bank, 155 Mo. 95, 55 S. W. 989.**

The condition of the title to insured property is a material and important factor in determining the degree of risk, and the Courts of Missouri have uniformly followed the rule that where the true condition of the title is not disclosed, by the insured, the policy is thereby rendered void. Even though such representation is innocently made without intent to defraud, its falsity, without more, prevents recovery on the policy. The insured is presumed to know the condition of the title and cannot cast the burden of its own carelessness or ignorance on the insurance company.

**Overton v. American Central Insurance
Co., 79 Mo. App. 1, 4.**

**Roberts v. State Insurance Co., 26 Mo.
App. 92, 97.**

**Holloway v. Dwelling House Insurance
Co., 48 Mo. App. 1, 6.**

**Brenner v. Connecticut Fire Insurance
Co., 99 Mo. App. 718.**

**Connecticut Fire Insurance Co. v. Man-
ing, 160 Fed. 382.**

**American Insurance Co. v. Barnett, 73
Mo. 364.**

**Cole v. Niagara Fire Insurance Co., 126
Mo. App. 134.**

The Defendant in Error did not pay the required fees until January 10th, 1911. This conclusively and affirmatively appears from Stipulation of Fact, Transcript p. 35, and from Certificate of Authority and Receipt from Secretary of State for fees, Transcript pp. 85 and 86 respectively, introduced in evidence by Defendant in Error. The fire occurred August 13th, 1910, and the term of the policy expired October 5th, 1910, for it was written October 5th, 1909, for the "term of one year," Transcript p. 8. Compliance did not take place, therefore, until five months after the fire, nor until three months after the policy had expired by its terms. Even if the title of the defendant in error could be vitalized by compliance for future purposes, it is submitted that this could not affect a condition of an insurance policy made and issued in October, 1909, which condition was then untrue and in reliance upon the truth of which the policy in question was issued.

As was said in *Lane v. Parsons, Rich & Co., supra*, in relation to the unconditional and sole ownership clause at 106 N. W. 485, 487:

"The words used refer to the present and not to the future, and the conditions relate to facts as they exist at the date of the policy. (Citing authorities.)"

Furthermore, it is not the law of Colorado, and no case in Colorado has been found or submitted in evidence to show that title relates back upon compliance by the delinquent corporations with the requirements of the Colorado statutes.

On the other hand, in the case of Western Electric Co. v. Pickett, 51 Colorado 415, 118 Pac. 988, pleaded in the answer and introduced in evidence, as appears at pages 18 and 251 of the transcript of record, it is held that compliance with the statute with reference to foreign corporations would not validate an action commenced prior to such compliance, so as to remove the existing bar of the Statute of Limitations, at the time of such compliance.

"Our statute, in substance, says that no such corporation shall do business until this fee is paid and other acts complied with
* * * Compliance after the commencement of an action will not remove the bar of the statute, so as to give effect, and recognize the validity of the action from its inception up to the time the statute was complied with." (Pp. 254-255, Transcript of Record.)

Historically speaking, it will be borne in mind that until 25 or 30 years ago in most of the states, including Colorado, no incorporation fee based upon capital stock was required of either domestic or foreign corporations, and only a nominal fee for filing articles and appointment of process agent was required.

The legislative purpose is obviously different in requiring the substantial fee now provided, and decisions rendered prior to these statutes are not controlling as to the force and effect of the present statute.

In *Jones v. Aspen Hardware Co.*, *supra*, the legislative purpose is set forth:

"One object of this statute is to restrict the organization of 'wild-cat' corporations, it being supposed that the increased fee required by the act would, in a measure, at least, prevent the overcapitalization of companies. The legislature being of the opinion that this purpose would be advanced by requiring the fee to be paid as a condition precedent to the exercise of any corporate power, it is the duty of the courts to give effect to this intent as the same is manifest from the plain language of the act."

In *Edwards v. D. & R. G. R. Co.*, 13 Colo. 59, cited in *Jones v. Aspen Hardware Co.*, it is said:

"The object to be accomplished or the mischief to be remedied or guarded against may be considered in construing doubtful statutes. Aside from securing a material increase of the public revenue, the statute before us will discourage the organization of corporations for fraudulent purposes. The good name and credit of the state has suffered through the sale of stock by manipulators who have no serious expectation that there will be a return upon the investment. The capital stock is put at a fabulous sum, and sold at a figure so surprisingly low as to tempt the unwary. The comparatively large advancement in cash as a filing fee

made prerequisite by the statute will operate, to some extent, as a wholesome restraint."

Both the fair name and the purse of the State being involved, no valid reason can be urged why the legislature may not make the payment of the fee a "prerequisite" and a "condition precedent to the exercise of any corporate power."

There is a marked distinction between a statute prohibiting transactions and providing a penalty in case the prohibited thing is done, and one providing conditions, the fulfilment of which is a prerequisite to the accomplishment of the prohibited thing.

In determining the law of Colorado from its decisions, there is no room for argument or inference for the language of both the statute and the decisions is plain and unambiguous.

This is the actual holding and it is so said by the Colorado courts.

Concerning acquiring title to property by corporations, this is certainly the law.

(a) "The taking of title to property was certainly the exercise of corporate power, and as such prohibited by the express terms of the statute."

(b) That the payment of the fee is "a condition precedent to the exercise of any corporate power."

(c) The failure to pay the fee "may be taken advantage of collaterally."

(d) That foreign corporations have no greater rights than domestic corporations.

(e) That "it is the duty of the courts to give

effect to the statute, as the most efficient way to compel obedience to the statute is to enforce it as it reads."

The last proposition by inference and deduction overrules the contention that the sovereign state alone can question by direct proceedings title to property of foreign corporations acquired in contravention of its laws.

However, Plaintiff in Error in this case is not claiming any interest in the title of the defendant in error, nor is it attempting to usurp any of the privileges of the sovereign state, but is merely asserting the truth of a fact material to the issuance of the policy in suit, namely, that at the time such policy was issued, the defendant in error had no title to the premises upon which it attempted to take out insurance.

In determining this point the Supreme Court of Missouri made no mention of these statutes and decisions pleaded and proved, but rested its decision on earlier decisions rendered by the Courts of Colorado and this Court construing an earlier statute of Colorado.

All these decisions were rendered before the enactment of the present statute under consideration and, therefore, did not in any way construe the present statute.

In *Insurance Co. v. Allis Co.*, 11 Colo. App. 264; 53 Pac. 242, one of the cases relied on by the Supreme Court of Missouri, the statute there under consideration was "General Statutes," Secs. 261, 262, for the opinion so states. These sections are sections 916 and 919 of Revised Statutes of Colorado.

do, 1908, and were introduced in evidence and appear at pp. 133-134 of the Transcript.

These are the identical statutes which were under consideration in *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93; 33 L. Ed. 317, and in every other case cited in the opinion of the Supreme Court of Missouri on this point.

While these are the present statutes requiring filing of articles of incorporation and appointment of process agent, yet, Section 904 makes an additional requirement that "the fee shall be due and payable upon the filing of the certificate of incorporation."

So, that the old provision for filing still remains on the books in its original form, but the additional requirement of paying the fee was enacted in 1901. Under the old statutory requirement no consequence was attached, nor penalty imposed, for the failure to file the articles and appoint the process agent, other than to make the stockholders and directors liable for debts. Therefore, we say we are not precluded by the decisions of the Courts of Colorado and of this court in *Fritts v. Palmer*, *supra*, but on the other hand, we say that it was entirely within the power of the legislature of the state to make additional penalties for failure to pay the fee. This penalty is, as construed by the later Colorado decisions "to enforce the statute as it reads."

This is not done for the benefit of the parties, but as is said "to enforce future compliance." If in so doing some advantage is received by one of the parties, it does not affect the power of the legislature to provide a means of enforcing the statute, although

it may inure to the advantage of parties other than the state. Moreover, in this way of enforcing the statute, the state does get the benefit of securing its fee as manifested in the present case, by the payment of the fee although tardy.

These statutes and decisions of Colorado were pleaded and proved in Missouri as matters of fact and we are aware of the rule of this Court that "what is matter of fact in the State Court is matter of fact in this Court upon review; and this applies where foreign law is in question in the State Court as well as to any other issues of fact." Western L. Indemnity Co. v. Rupp, 235 U. S. 261; 59 L. Ed. 220 at page 225.

In this connection the majority opinion says:
(Transcript of Record p. 317.)

"The evidence discloses the fact that at the time the policy in suit was issued the respondent had not taken out a license to do business in the State of Colorado; and had not done so at the time it purchased the property, upon which the building insured stood, for which it had paid about \$175,000, and received a general warranty deed thereto; but subsequently thereto, it took out a license to do business in the State, and paid all fees and taxes due on the property, long before the fire occurred."

We do not think that C. J. Woodson meant to give the impression that the corporation license fee required to be paid to the Secretary of State was paid

before the fire, as he limits his statement to "fees and taxes due on the property." The fees to be paid to the Secretary of State have nothing whatever to do with the taxes on the property—one is a corporate license tax and the other is a property tax. Lest, however, this Court might be misled by this statement, we again call the attention of the Court to the two documents issued by the Secretary of the State of Colorado, Transcript pages 85 and 86, and Stipulation, Transcript p. 35. The Secretary of the State of Colorado is a public officer and the Certificate of Authority to do business is a public document. This was introduced by the Defendant in Error to show that it had complied with the statutes of Colorado and bears date January 10, 1911, and states that on that day the Defendant in Error had complied with the statutes of Colorado. We have no idea that with such an affirmative and conclusive showing as to the date of the compliance with the statutes the Missouri Court attempted to make a finding of fact without sufficient or any support in the evidence.

Out of caution, however, we cite an excerpt from *Interstate Amusement Co. v. Albert*, 239 U. S. 560; 60 L. Ed. 168:

"It is settled that such findings of fact, in ordinary cases other than those arising under the 'contract clause' of the Constitution, are binding upon this court. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 97, 53 L. Ed. 417, 424, 29 Sup. Ct. Rep. 220; *Ran-kin v. Emigh*, 218 U. S. 27, 32, 54 L. Ed. 915,

920, 30 Sup. Ct. Rep. 672; *Miedreich v. Lauenstein*, 232 U. S. 236, 243, 58 L. Ed. 584, 589, 34 Sup. Ct. Rep. 309. But this rule has its exceptions, as, for instance, where there is ground for the insistence that a Federal right has been denied as the result of a finding that is without support in the evidence. *Southern P. Co. v. Schuyler*, 227 U. S. 601, 611, 57 L. Ed. 662, 669, 43 L. R. A. (N. S.) 901; 33 Sup. Ct. Rep. 277; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 259, 58 L. Ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; *Carlson v. Washington*, 234 U. S. 103, 106, 58 L. Ed. 1237, 1238, 34 Sup. Ct. Rep. 717."

This case is an authority on another point. In this case (239 U. S. 560), the question of the Tennessee statute requiring a foreign corporation to file its articles before doing business in the state as a condition precedent to the right to sue in her courts was passed upon and sustained as constitutional, and this Court says that the statute "was evidently established as a matter of public policy, not so much for the benefit of parties sued as in the interest of the people at large; and the question is not so much —what was agreed to be done? as—what was done?" This being the last decision of this court on the subject, we believe that *Fritts v. Palmer*, *supra*, has been modified to the extent that this court does not now hold to the doctrine that none but the sovereign state may question the authority of a non-complying foreign corporation to acquire or hold real estate where such act is prohibited by statute.

It is quite unnecessary to cite authorities to the proposition that the title to real property is a local question and is governed by the laws of Colorado, the situs of the property. The majority opinion treats of this subject as being a "product of the State of Colorado," and purports to base its opinion upon the laws of that State, but in so doing we have plainly shown, failed to give full faith and credit to the later laws of Colorado which govern in this case.

The duty to give full force and effect to the Public Acts of Colorado, a sister state, was obligatory upon Missouri Courts under the Federal Constitution. This is not the case of misinterpreting the statute without denying its validity.

It is the case of the Missouri Court in effect denying the existence of the statute.

It is not the case of the courts recognizing the existence of the statute and denying its applicability to the case.

Moreover, the Colorado Courts having decided that the statute was "plain and unambiguous," and should be enforced as it read, and there was no latitude for interpretation in the Missouri courts and the only thing for the latter courts to do was to apply the statute to the case. In ignoring these plain provisions of the statute and making no mention of them nor the decisions of the Colorado Courts upon such statutes, we earnestly urge that the Missouri Court failed to accord to the Colorado statutes and decisions the credit to which they were entitled under the Federal system.

In conclusion, the Supreme Court of Missouri did not decide against the Plaintiff in Error upon

any independent state ground, but deemed the Federal questions to be before it, discussed such questions at great length in its opinion, and decided them all adversely to the Federal rights asserted and claimed.

Upon such a state of the record, the contentions here made are meritorious and substantial.

We respectfully submit that the motion to dismiss or affirm should be denied, and Plaintiff in Error given the opportunity, accorded by the rules of the Court, to fully present the important questions raised by this writ of error.

Respectfully submitted,

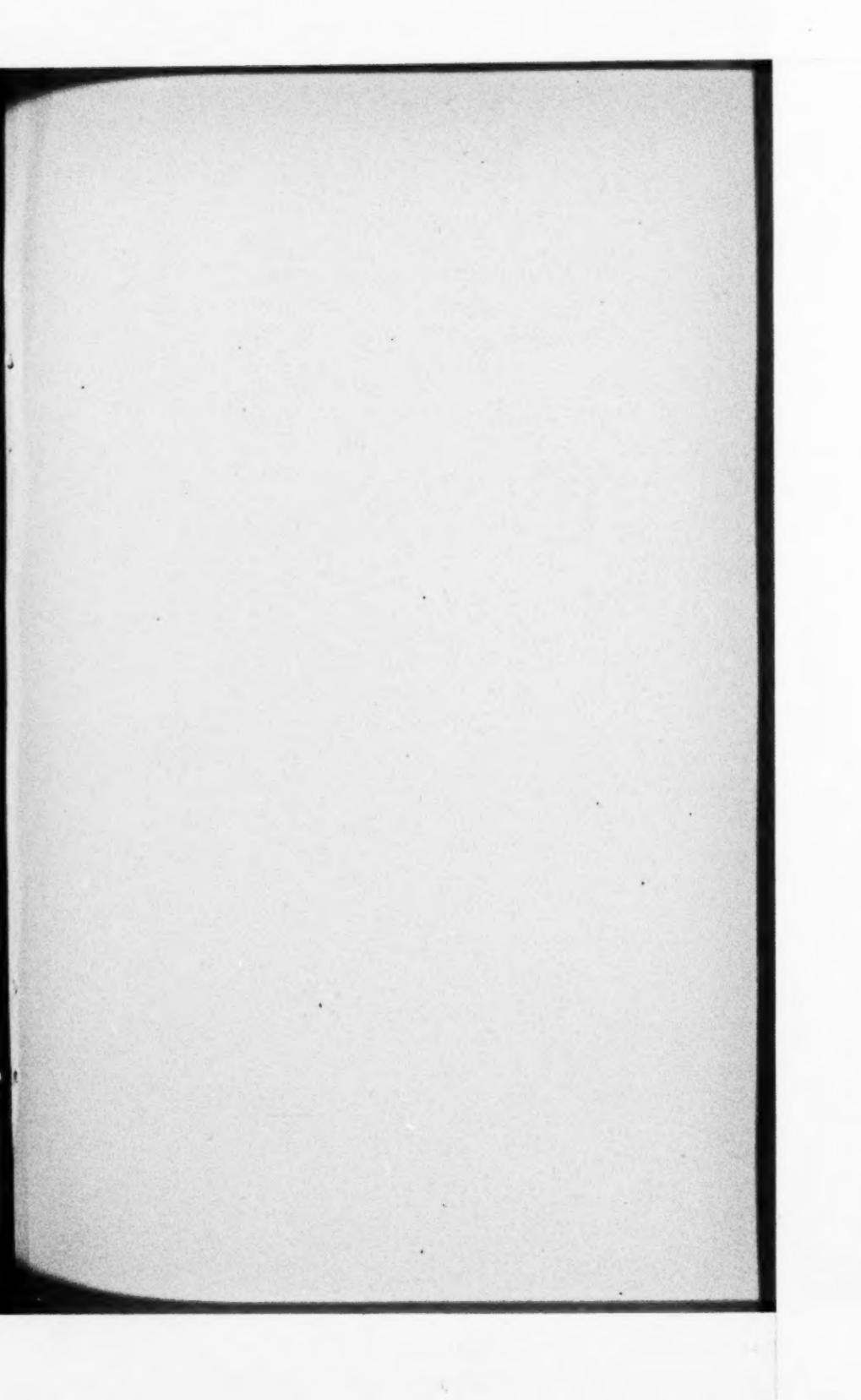
FRED HERRINGTON.

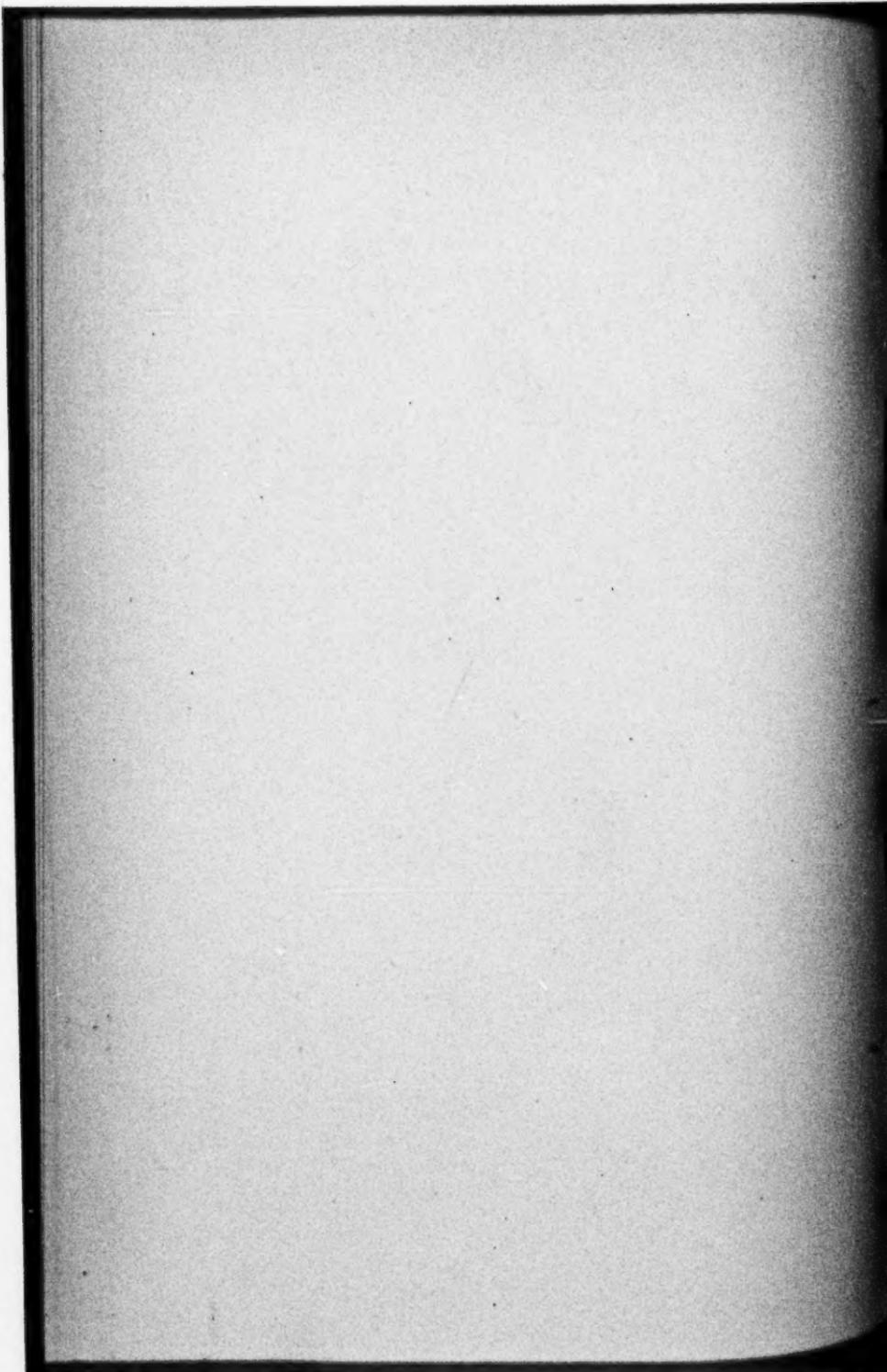
MASON A. LEWIS.

JAMES B. GRANT.

DAVID H. ROBERTSON.

Attorneys for Plaintiff in Error.





IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1916.

No. 584.

PENNSYLVANIA FIRE INSURANCE COMPANY, OF PHILADELPHIA, PENNSYLVANIA,

Plaintiff in Error,

vs.

THE GOLD ISSUE MINING & MILLING COMPANY,

Defendant in Error.

*Error to the Supreme Court of the State
of Missouri.*

ADDITIONAL BRIEF OF PLAINTIFF
IN ERROR

I.

The original brief of Plaintiff in Error was filed to meet the motion of Defendant in Error to dismiss or affirm, but on account of the importance of the question involved to the insurance companies doing business in practically every state in the

Union, and for the further reason that under the rules of this Court, this case may now be considered for final determination, we feel justified in amplifying our argument somewhat on the jurisdictional question.

The reason of the rule for entertaining jurisdiction in suits against corporations outside of the state of their creation, had its origin and foundation in the inconvenience of rendering citizens of the state in which the transactions occurred "no legal redress short of the seat of the company in another State. In many instances the cost of the remedy would have largely exceeded the value of its fruits."

Railroad Co. v. Harris, 12 Wall. 65, 20 L. Ed. 354, 359.

Hardship is the reason for the rule, but its legal justification is based on two elements—that of agency and consent.

Where a corporation, through its agents, extends its business to the confines of states other than that of its origin, it is only equitable, in accordance with the foregoing principles, that these agents should be the representatives of the corporation for service of process, as well as for the transaction of its general business. When, however, an officer of the state is designated by statute for service of process, a very different situation arises. Is such officer in any sense a true agent of the corporation?

It is fundamental in the law of agency that the principal shall have a choice in the selection of his agents, that he shall have the right to revoke the agency at will, except in the case of a power coupled with an interest, and that the agent owes certain

duties of fidelity to his principal. In this case, however, the Superintendent of Insurance becomes *ipso facto* the agent without any right extended to the foreign corporation to select or designate any other person. Section 7042 of the Missouri statutes (the statute under consideration in this case) provides that the Superintendent of Insurance shall continue as the process agent of the foreign corporation so long as the insurance company "shall have any policies or liabilities outstanding in this state." In other words, the insurance company has no power of revocation, even though it may withdraw entirely from the State of Missouri. And lastly, the Superintendent of Insurance has no duties whatsoever to foreign insurance companies. He is not even compelled to notify them of the commencement of proceedings. He is not in any sense a true representative or agent of the company, and we therefore submit that where such an anomalous position is created the elements of agency in its legal sense are entirely lacking.

When the question of consent is considered, it seems evident that consent, express or implied, must be present in order to confer jurisdiction in suits against corporations outside of the state of their creation, for the courts still adhere to "the theoretical and legal view that the domicil of a corporation is only in the state where it is created."

St. Clair v. Cox, 16 Otto 350; 27 L. Ed. 222, at 224.

This view is in harmony with the earliest and

leading case of Railroad Co. v. Harris, *supra*, at page 358, wherein this Court said of the company:

"It cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it does business there it will be presumed to have assented and will be bound accordingly."

Beginning with the case of Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451, down through St. Clair v. Cox, 16 Otto 350, 27 L. Ed. 222; Mutual Reserve Fund Life Association v. Phelps, 190 U. S. 147, 47 L. Ed. 987; Old Wayne Mutual Life Association v. McDonough, 204 U. S. 8, 51 L. Ed. 345; to the case of Simon v. Southern Railway Co., 236 U. S. 115, 59 L. Ed. 492, this Court has tacitly recognized the principle that "statutory consent" to be sued outside of the domicil of the corporation extends only to "litigation arising out of its transactions in the state" where suit is brought. (See main brief, pages 8-17.)

And in the Simon case, the rule is expressly announced, at page 500:

"That the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states."

This court further said in the Simon case, at page 501, that the conclusion there reached,

"makes it unnecessary to consider whether the Southern Railway was doing business in Louisiana."

Thus, as we understand the principle laid down in the Simon case, and foreshadowed in the earlier cases, it is, that service of process on an officer of the state designated by statute is ineffectual to give jurisdiction for the trial of causes of action arising outside of the state, irrespective of whether the foreign corporate defendant is doing business in the state. And the rule is based on the fundamental principle that unless there is consent, express and not statutory, to jurisdiction over such causes of action, or unless there is an actual relationship of agency, in the sense of true representation of the foreign corporation, no state can extend its jurisdiction to matters with which neither it nor its citizens have concern.

Yet as a necessary result of the decision of the Supreme Court of Missouri in the case at bar, the State of Missouri is placed in the position of forcibly exacting from foreign insurance companies the appointment of the Superintendent of Insurance of Missouri as process agent for transactions arising in any other state of the Union.

When we consider that inconvenience and hardship are given as the reasons for the rule allowing any suits whatsoever to be brought against corporations outside of the state of their domicil, it is difficult to see where the inconvenience and hardship are overcome by trying in Audrain County, Missouri, the issues involved in a cause of action arising in Colorado, where the plaintiff and defendant are both foreign corporations. Presumptively the facts which would defeat a policy of insurance are those present in the state where the cause of action arose;

and it seems evident that the hardship and inconvenience in this case are imposed upon the plaintiff in error. As well might the defendant in error corporation have selected Maine or California or any other state in which to bring its suit, for it is a matter of common knowledge that insurance companies are doing business in practically every state in the Union.

It is submitted that the consideration of these facts leads conclusively to the conviction that in this case the reasons of the rule, hardship and inconvenience, are lacking, and that when the rule under such circumstances is extended to cover foreign causes of action under substituted service, there is an invasion of the constitutional restriction as to due process of law, in accordance with the holding in the Simon case.

The principle involved is clearly enunciated by Mr. Justice Hughes, in *Provident Savings Life Assurance Society v. Kentucky*, 239 U. S. 103; 60 L. Ed. 167. The question there was on the right of a state to levy a tax on a foreign corporation on account of the fact that there were outstanding policies held by resident policy holders after it had withdrawn from the state and ceased to solicit or write any new insurance therein. The Court said:

“In such case it would be the actual transaction of business that would furnish the ground of the license exaction, and not the mere existence of the obligation under policies previously written. These policies are contracts already made; the state cannot destroy them or make their mere con-

tinuance, independent of acts within its limits, a privilege to be granted or withheld. Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the state's control.

"The defendant in error relies upon expressions contained in the opinions in Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 610, 43 L. Ed. 569, 571, 19 Sup. Ct. Rep. 308, and Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 157, 47 L. Ed. 987, 994, 23 Sup. Ct. Rep. 707—expressions which (in a full review of these cases and others) were explained and limited in Hunter v. Mutual Reserve L. Ins. Co., 218 U. S. 573, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686, 31 Sup. Ct. Rep. 127. (Page 171.)"

"The principle involved applies to the assertion of authority on the part of the state to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control. It follows that the quality of the acts, with respect to which the state exercises the taxing power must be considered when the constitutional protection against the transgression of jurisdictional limits is invoked." (Page 170.)

II.

In the main brief of Plaintiff in Error, at page 54, the case of Rogers v. Hennepin is cited as

authority. By error, however, the first decision of that case appearing at 239 U. S. 621, was given. The proper reference should be 240 U. S. 184, 60 L. Ed. 594, wherein it is said, at page 598:

"It is well settled that where the state court does not decide against the plaintiff in error upon an independent state ground, but, deeming the Federal question to be before it, actually entertains it and decides it adversely to the Federal right asserted, this court has jurisdiction to review the judgment, assuming it to be a final judgment, as it is here. (Citing numerous authorities.)"

III.

At pages 56 to 74 of the main brief of Plaintiff in Error, the question of full faith and credit is discussed.

In this connection it is submitted that the case of El Paso & Northeastern Railway Co. v. Gutierrez, 215 U. S. 87, 54 L. Ed. 106, conclusively establishes the fact that the defense rested upon the statutes of the State of Colorado and their construction by the courts of that state, was properly raised. It is there said, at page 109:

"That the claim of immunity under the territorial act, because of the failure of the plaintiff to comply with its provisions as to the affidavit within ninety days, etc., presented a Federal question within the meaning of section 709 of the Revised Statutes, was decided in Atchison, T. & S. F. R. Co. v.

Sowers, *supra*, in which case it was held that, where suit was brought in a state court, a claim of defense under the provisions of the New Mexico statute was a claim of Federal right, which, when adversely adjudicated, gave jurisdiction to this court to review the judgment."

So in the case at bar, the Plaintiff in Error interposed a claim of defense under the provisions of the Colorado statute, which, when adversely adjudicated by the Supreme Court of the State of Missouri, offered ground for jurisdiction in this Court.

Respectfully submitted,

FRED HERRINGTON,

MASON A. LEWIS,

JAMES B. GRANT,

DAVID H. ROBERTSON,

Attorneys for Plaintiff in Error.